

## 70A Am. Jur. 2d Social Security and Medicare Summary

American Jurisprudence, Second Edition | May 2021 Update

### Social Security and Medicare

George Blum, J.D., John Bourdeau, J.D., Kerry M. Diggin, J.D., Romualdo P. Eclavea, J.D., Edward K. Esping, J.D., Tracy Bateman Farrell, J.D., Jill Gustafson, J.D., Janice Holben, J.D., Alan J. Jacobs, J.D., Anne Knickerbocker, J.D., Jack K. Levin, J.D., Anne E. Melley, J.D., LL.M., Tom Muskus, J.D., Karl Oakes, J.D., Eric C. Surette, J.D., and Barbara J. Van Arsdale, J.D.

### Correlation Table

## Summary

### Scope:

This article discusses the old-age, survivors', disability, hospitalization, and medical insurance features of the Social Security Act, with particular attention given to such matters as the interpretation of the Act; employers, employees, and earnings covered by the Act; types of benefits payable under the Act (including Supplemental Security Income); Social Security numbers and earnings records; matters affecting computation of benefit amounts; applications for and payment of benefits; evaluation of claimed disability; Medicare programs, including those services and charges that are not permitted; and Medicare claims and administrative proceedings.

### Treated Elsewhere:

Exemption of social security benefits from claims of creditors, see [Am. Jur. 2d, Exemptions § 197](#)

Federally assisted welfare programs under the Social Security Act, including Aid to Families With Dependent Children, child welfare services, and Medicaid, see [Am. Jur. 2d, Welfare Laws §§ 4 to 51](#)

Pensions, see [Am. Jur. 2d, Pensions and Retirement Funds §§ 1 et seq.](#)

Private health, accident, medical, hospitalization, and disability insurance, see [Am. Jur. 2d, Insurance §§ 550 to 641, 1451 to 1488](#)

Railroad Retirement Act, see [Am. Jur. 2d, Pensions and Retirement Funds §§ 888 to 1064](#)

Taxation of social security benefits, see [Am. Jur. 2d, Federal Taxation ¶¶ 13001 to 13009](#)

Unemployment benefits available to those who leave a job due to illness or disability, see [Am. Jur. 2d, Unemployment Compensation § 109](#)

Unemployment compensation provisions of the Social Security Act, see [Am. Jur. 2d, Unemployment Compensation §§ 187, 188](#)

Veterans, federal laws providing for hospital, nursing home, and domiciliary care for, see [Am. Jur. 2d, Veterans and Veterans' Laws §§ 53 to 76](#)

**Research References:**

**Westlaw Databases**

[American Law Reports \(ALR\)](#)  
[West's A.L.R. Digest \(ALRDIGEST\)](#)  
[American Jurisprudence 2d \(AMJUR\)](#)  
[American Jurisprudence Legal Forms 2d \(AMJUR-LF\)](#)  
[American Jurisprudence Proof of Facts \(AMJUR-POF\)](#)  
[American Jurisprudence Pleading and Practice Forms Annotated \(AMJUR-PP\)](#)  
[American Jurisprudence Trials \(AMJUR-TRIALS\)](#)  
[Code of Federal Regulations \(CFR\)](#)  
[Federal Procedure \(FEDPROC\)](#)  
[Federal Procedural Forms \(FEDPROF\)](#)  
[RIA - Federal Tax Coordinator 2d\(FTC\) \(RIA-FTC\)](#)  
[Social Security Handbook § \(SSA-HDBK\)](#)  
[Social Security Administration Program Operations Manual \(POMS\) \(SSA-POMS\)](#)  
[Social Security Law and Practice \(SSLP\)](#)  
[Uniform Laws Annotated \(ULA\)](#)  
[United States Code Annotated \(USCA\)](#)

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### Part One. Social Security and SSI Benefits

#### I. Overview

##### A. Nature and Purpose of Act

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## Research References

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  0.5 to 4

### Primary Authority

[U.S. Const. Amends. I, V, XIV](#)


[42 U.S.C.A. §§ 301 to 1397mm](#)

[Pub. L. No. 103-296 § 101](#)

[18 C.F.R. Pt. 404](#)

### A.L.R. Library

[A.L.R. Index, Social Security](#)

[West's A.L.R. Digest, Social Security and Public Welfare](#)  0.5 to 4

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## 70A Am. Jur. 2d Social Security and Medicare § 1

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### I. Overview

#### A. Nature and Purpose of Act

## § 1. Nature of Social Security Act

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  0.5 to 4

The principal law governing the awarding of social security benefits is the Social Security Act.<sup>1</sup> The Social Security Administration (SSA) is an independent agency in the executive branch<sup>2</sup> which has the primary authority for administering the Act.<sup>3</sup> General regulatory authority under the Act is vested in the Commissioner of Social Security. In evaluating particular claims, various interpretations and rulings of the Social Security Administration (SSA), as well as federal judicial decisions, must be looked at for understanding application of the Act itself.

The Social Security Act has its origin in the observations of the frequency of the tragic sequence of old age, disability, loss of earning power, destitution, and dependency on public or private charity, but coverage has not been limited to cases actually presenting all these features in full scope. Indeed, the concept of the statute is more inclusive; it is not simply a welfare program,<sup>4</sup> but by design, is a comprehensive contributory insurance plan to avert the personal hazards and the social problems which often attend old age.<sup>5</sup> Thus, the general purpose of the old-age, survivors', and disability insurance provisions of the statute is to protect workers and their dependents from the risk of loss of income due to the insured's old age, death, or disability.<sup>6</sup> Alternatively, as it has been succinctly put, the intent of the Act is to ameliorate some of the rigors of life.<sup>7</sup> It has been further stated that the purpose of the old-age benefits of the Act is to provide funds through contributions by employer and employee for the decent support of elderly workers who have ceased to labor.<sup>8</sup> Also, it has been declared that the social security system is a form of social insurance, enacted pursuant to Congress' power to spend money in aid of the general welfare, whereby persons gainfully employed, and those who employ them, are taxed in order to permit the payment of benefits to the retired and disabled, and their dependents.<sup>9</sup> Entitlement to Old Age, Survivors' and Disability Insurance (OASDI) benefits is based upon

the receipt of income from labor, which old age, death, or disability would interrupt, and not upon the receipt of income from the investment of capital, which these events would presumably not affect.<sup>10</sup>

The "right" to social security benefits is in a sense "earned," for the entire scheme rests on the legislative judgment that those who in their productive years were functioning members of the economy may justly call upon that economy, in their later years, for protection from the rigors of poverty.<sup>11</sup> However, while OASDI benefits have a general relationship to wages earned and the tax paid on them, it is not intended or required that benefits should be measured exactly by the amount of payments.<sup>12</sup> The fact that social security benefits are financed in part by taxes on an employee's wages does not in itself limit the power of Congress to fix the levels of benefits under the Social Security Act, or the conditions upon which they may be paid.<sup>13</sup>

Benefits under the Act are not limited to those based on past employment, and under a federal program to provide supplemental security income,<sup>14</sup> aged, blind, and disabled persons are eligible for benefits based on financial need.<sup>15</sup>

Social security benefits are not contractual and may be altered or even eliminated at any time.<sup>16</sup>

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#### Footnotes

- 1 42 U.S.C.A. §§ 301 to 1397mm. Major provisions of the Act discussed hereunder are 42 U.S.C.A. §§ 401 to 434 (old age benefits), and 42 U.S.C.A. §§ 1381 to 1383f.
- 2 The SSA was removed from the control of the Department of Health and Human Services effective March 31, 1995 (Pub. L. No. 103-296 § 101 (Aug. 15, 1994)), and the regulations were amended to reflect the change (62 Fed. Reg. 38448 (July 18, 1997)).
- 3 This authority includes the administration of the Federal Old-Age, Survivors, and Disability Insurance Benefits (OASDI) program (42 U.S.C.A. §§ 401 to 434) and the Supplemental Security Income for Aged, Blind, and Disabled (SSI) program (42 U.S.C.A. §§ 1381 to 1383f). See § 12.
- 4 *Califano v. Boles*, 443 U.S. 282, 99 S. Ct. 2767, 61 L. Ed. 2d 541 (1979).
- 5 *Pasquale v. Cohen*, 296 F. Supp. 1088 (D.R.I. 1969).
- 6 *Delno v. Celebrezze*, 347 F.2d 159 (9th Cir. 1965); *Kelbach v. Harris*, 634 F.2d 1304 (10th Cir. 1980) (further holding that since the Act has this general purpose, a person in prison does not need disability benefits, since the state is responsible for his subsistence).
- 7 *Dvorak v. Celebrezze*, 345 F.2d 894 (10th Cir. 1965).
- 8 *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 66 S. Ct. 637, 90 L. Ed. 718, 162 A.L.R. 1445 (1946).
- 9 *Flemming v. Nestor*, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960).
- 10 *Delno v. Celebrezze*, 347 F.2d 159 (9th Cir. 1965).  
As to coverage based on a claimant's past employment or self-employment, see §§ 23 to 60.
- 11 *Flemming v. Nestor*, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960).
- 12 *Whitaker v. U.S.*, 194 F. Supp. 505 (D. Mass. 1961), judgment aff'd, 295 F.2d 817 (1st Cir. 1961).
- 13 *Richardson v. Belcher*, 404 U.S. 78, 92 S. Ct. 254, 30 L. Ed. 2d 231 (1971).
- 14 42 U.S.C.A. §§ 1381 to 1383f.
- 15 § 21.
- 16 *Brown v. Apfel*, 192 F.3d 492 (5th Cir. 1999).

## 70A Am. Jur. 2d Social Security and Medicare § 2

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### I. Overview

#### A. Nature and Purpose of Act

## § 2. Constitutionality of Act

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  0.5 to 4

Both the basic insurance program established by the Social Security Act and the means of funding it have been declared constitutionally valid by the Supreme Court.<sup>1</sup> The Act is, nonetheless, subject to constitutional scrutiny with respect to its specific provisions.<sup>2</sup> Thus, an individual with a "colorable" constitutional argument<sup>3</sup> can challenge the validity of specific provisions of the Act on grounds such as violations of equal protection under the due process clause of the Fifth Amendment.<sup>4</sup> For example, the social security taxation system was upheld in the face of First,<sup>5</sup> Fifth,<sup>6</sup> and 14th Amendment<sup>7</sup> challenges by a group of Amish people who objected to the imposition of the social security tax on church employees because their church doctrine required them to provide for their own financial security, or alternatively for the church to provide for them.<sup>8</sup> A Social Security Act provision<sup>9</sup> prohibiting the use of the phrase "social security" in certain manners does not violate the First Amendment<sup>10</sup> as applied to a taxpayer advocacy organization, despite the claim that the application penalizes the organization's speech without finding actual intent to defraud; the provision serves a strong, subordinating interest in protecting social security recipients from deceptive mailings.<sup>11</sup>

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### Footnotes

- <sup>1</sup> Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A.L.R. 1293 (1937).
- <sup>2</sup> Flemming v. Nestor, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960).
- <sup>3</sup> Califano v. Sanders, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977).

- 4 Weinberger v. Wiesenfeld, 420 U.S. 636, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975) (construing U.S. Const.  
Amend. V).
- 5 U.S. Const. Amend. I.
- 6 U.S. Const. Amend. V.
- 7 U.S. Const. Amend. XIV.
- 8 Bethel Baptist Church v. U.S., 822 F.2d 1334 (3d Cir. 1987), See also U.S. v. Lee, 455 U.S. 252, 102 S.  
Ct. 1051, 71 L. Ed. 2d 127 (1982)
- 9 42 U.S.C.A. § 1320b-10.
- 10 U.S. Const. Amend. I.
- 11 National Taxpayers Union v. U.S. Social Sec. Admin., 302 Fed. Appx. 115 (3d Cir. 2008), cert. denied, 130  
S. Ct. 361, 175 L. Ed. 2d 23 (2009).

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## 70A Am. Jur. 2d Social Security and Medicare § 3

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### Part One. Social Security and SSI Benefits

#### I. Overview

#### A. Nature and Purpose of Act

## § 3. Act provides basic legal framework

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  0.5 to 4

Rights to social security benefits derive solely from the statutory scheme<sup>1</sup> and not from the United States Constitution or common law.<sup>2</sup> Therefore, the law governing eligibility and other issues related to social security is found exclusively in:

- (1) the Act,<sup>3</sup>
- (2) the regulations promulgated by the Social Security Administration (SSA),<sup>4</sup> and
- (3) interpretations of the statute<sup>5</sup> and regulations<sup>6</sup> made by the SSA and federal and state courts.

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#### Footnotes

- <sup>1</sup> [Guarino v. Celebrezze](#), 336 F.2d 336 (3d Cir. 1964).
- <sup>2</sup> [Gaston v. Richardson](#), 451 F.2d 461 (6th Cir. 1971).
- <sup>3</sup> [42 U.S.C.A. §§ 301 to 1397mm](#).
- <sup>4</sup> As to a general overview of how the act is interpreted, see §§ [4](#) to [9](#).  
18 C.F.R. Pt. 404.
- <sup>5</sup> As to general discussion of regulations promulgated by the SSA, see §§ [10](#) to [13](#).
- <sup>6</sup> §§ [4](#) to [9](#).

6 §§ 10 to 13.

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### Part One. Social Security and SSI Benefits

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## Research References

### West's Key Number Digest

West's Key Number Digest, [Health](#)  465, 512(1), 523, 557(2)

West's Key Number Digest, Social Security and Public Welfare  2, 6, 124.1 to 124.30

### Primary Authority

[5 U.S.C.A. § 553](#)

[42 U.S.C.A. §§ 401 to 434, 1381 to 1383f, 1351 to 1355](#)

[20 C.F.R. §§ 404.985, 416.1485](#)

HALLEX I-1-0-1

HALLEX I-1-0-4

Soc. Sec. Rul. 82-55

Soc. Sec. Rul. 96-1p

### A.L.R. Library

A.L.R. Index, Social Security

West's A.L.R. Digest, [Health](#)  465, 512(1), 523, 557(2)

West's A.L.R. Digest, Social Security and Public Welfare  [2, 6, 124.1 to 124.30](#)

**Treatises and Practice Aids**

[Federal Procedure, L. Ed. §§ 2:69 to 2:125](#)

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### Part One. Social Security and SSI Benefits

#### I. Overview


#### B. Interpretation of the Social Security Act

##### 1. General Considerations

## § 4. Liberal construction

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  2, 124.1 to 124.10

The Social Security Administration's interpretation of any statutory provision or regulation must be read in light of the Social Security Act and regulations as a whole.<sup>1</sup> The Act is to be accorded a liberal application in consonance with its remedial and humanitarian aims.<sup>2</sup> As a remedial statute, the Act is to be broadly construed and liberally applied in favor of beneficiaries.<sup>3</sup> Accordingly, for example, the liberal construction of the Act applies generally to issues involving—

— coverage.<sup>4</sup>

— whether "good cause" has been shown to justify the remand of an SSA decision.<sup>5</sup>

— the informality of rules of evidence in SSA proceedings.<sup>6</sup>

— whether attorney's fees ought to be awarded.<sup>7</sup>

— the "substantial evidence" test of judicial review, in overturning an SSA denial of benefits.<sup>8</sup>

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### Footnotes

- 1 Pasquale v. Cohen, 296 F. Supp. 1088 (D.R.I. 1969).
- 2 Capato ex rel. B.N.C. v. Commissioner of Social Sec., 631 F.3d 626 (3d Cir. 2011); Brown and Bartlett v.  
U.S., 330 F.2d 692, 28 Ohio Op. 2d 81 (6th Cir. 1964).
- 3 Schoofield v. Barnhart, 220 F. Supp. 2d 512 (D. Md. 2002).
- 4 Drafts v. Celebrezze, 240 F. Supp. 535 (E.D. S.C. 1965).
- 5 Wray v. Folsom, 166 F. Supp. 390 (W.D. Ark. 1958).
- 6 Wray v. Folsom, 166 F. Supp. 390 (W.D. Ark. 1958).
- 7 McGraw v. Barnhart, 450 F.3d 493, 64 Fed. R. Serv. 3d 1238 (10th Cir. 2006).
- 8 Essig v. Secretary of Health and Human Services, 531 F. Supp. 55 (E.D. N.Y. 1981).

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## 70A Am. Jur. 2d Social Security and Medicare § 5

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### Part One. Social Security and SSI Benefits

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## § 5. Construction should favor coverage

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  2, 124.1 to 124.10

A proper interpretation of the Act's Title II, the old-age provisions,<sup>1</sup> favors inclusion, not exclusion, of the individual involved.<sup>2</sup> If any basis in law exists to grant relief, the Act is generally construed in that way,<sup>3</sup> even though the words of the statute leave room for a contrary interpretation.<sup>4</sup> This liberal approach to coverage is maintained at least partially because the social security system is a social insurance program based on earned participation, not a social welfare program.<sup>5</sup> For example, the rule of construction favoring coverage led to—

— an expansive approach to the standards for child's benefit eligibility.<sup>6</sup>

— a lenient view of the showing which a disability claimant must make with respect to his incapacity to engage in substantial gainful activity.<sup>7</sup>

— a finding that clinical evidence to corroborate a physician's testimony was not necessary, and the pain and discomfort caused by attempts at work did not have to aggravate substantially the claimant's malady to support an award of disability benefits.<sup>8</sup> On the other hand, statutory language prohibiting payment of social security disability benefits to claimants found not guilty by reason of insanity while such claimants are institutionalized at public expense should generally be construed broadly to prevent depletion of public funds at the hands of acquittees receiving double compensation for living expenses.<sup>9</sup>

However, Title II of the Act,<sup>10</sup> while remedial in nature, is not a general welfare program benefiting all needy persons.<sup>11</sup>

Like Title II, Title XVI (grants to states for aid to the permanently and totally disabled)<sup>12</sup> is benevolent legislation<sup>13</sup> to be liberally construed to effectuate its remedial purposes.<sup>14</sup>

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#### Footnotes

- 1 Title II is codified at 42 U.S.C.A. §§ 401 to 434.
- 2 *Rasmussen v. Gardner*, 374 F.2d 589 (10th Cir. 1967); *Schoofield v. Barnhart*, 220 F. Supp. 2d 512 (D. Md. 2002); *Ianni v. Barnhart*, 403 F. Supp. 2d 239 (W.D. N.Y. 2005).
- 3 *Lietz v. Flemming*, 264 F.2d 311 (6th Cir. 1959).
- 4 *Pleasant v. Richardson*, 450 F.2d 749 (5th Cir. 1971).
- 5 *Cunningham v. Harris*, 658 F.2d 239 (4th Cir. 1981).
- 6 *Damon v. Secretary of Health, Ed. and Welfare*, 557 F.2d 31 (2d Cir. 1977); *Hammonds for Green v. Bowen*, 652 F. Supp. 491 (S.D. N.Y. 1987).
- 7 *Kohrs v. Flemming*, 272 F.2d 731 (8th Cir. 1959).
- 8 *Polly v. Gardner*, 364 F.2d 969 (6th Cir. 1966).
- 9 *Artz v. Barnhart*, 214 F. Supp. 2d 459 (D.N.J. 2002), *aff'd*, 330 F.3d 170 (3d Cir. 2003).
- 10 42 U.S.C.A. §§ 401 to 434.
- 11 *Califano v. Jobst*, 434 U.S. 47, 98 S. Ct. 95, 54 L. Ed. 2d 228 (1977).
- 12 Title XVI is codified at 42 U.S.C.A. §§ 1351 to 1355.
- 13 *Adams v. Secretary of Health and Human Services*, 596 F. Supp. 449 (N.D. N.Y. 1984).
- 14 *Vaughn v. Califano*, 442 F. Supp. 185 (E.D. Tenn. 1977).

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## 70A Am. Jur. 2d Social Security and Medicare § 6

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### Part One. Social Security and SSI Benefits

#### I. Overview


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## § 6. Liberal construction's effect on remand

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare 2, 124.1 to 124.10

In deciding whether new evidence presented requires a remand for further consideration, the SSA and the courts construe the Act liberally, and narrow technicalities and interpretations which thwart the policies and purposes of the Act are avoided.<sup>1</sup> For example, a remand for "good cause" was ordered, where no person would have been prejudiced, and the new evidence bore directly and substantially on the matter in dispute;<sup>2</sup> and where relevant, probative and available evidence was either not originally before the SSA or not explicitly weighed and considered by it.<sup>3</sup>

In a supplemental security income (SSI) disability benefits case,<sup>4</sup> the court may order that benefits be paid when the record provides persuasive proof of disability and to remand for further proceedings would therefore serve no purpose.<sup>5</sup>

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### Footnotes

- <sup>1</sup> [Schroeder v. Hobby](#), 222 F.2d 713 (10th Cir. 1955).
- <sup>2</sup> [Wray v. Folsom](#), 166 F. Supp. 390 (W.D. Ark. 1958).
- <sup>3</sup> [Cutler v. Weinberger](#), 516 F.2d 1282 (2d Cir. 1975).
- <sup>4</sup> SSI is the subject of [42 U.S.C.A. §§ 1381 to 1383f](#).

5 [Morales ex rel. Morales v. Barnhart, 218 F. Supp. 2d 450 \(S.D. N.Y. 2002\).](#)

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## 70A Am. Jur. 2d Social Security and Medicare § 7

American Jurisprudence, Second Edition | May 2021 Update

### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### I. Overview


#### B. Interpretation of the Social Security Act

##### 1. General Considerations

## § 7. Strict construction when statutory language is clear

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare , 124.1 to 124.10

Despite the general rule requiring liberal construction,<sup>1</sup> the Act is not to be construed loosely.<sup>2</sup> Where no ambiguity in a statutory requirement exists—such as a specific time limit for filing an application—no "construction," liberal or otherwise, can give the statutory language a different meaning more favorable to a claimant.<sup>3</sup> For example, the reviewing court could not extend coverage to children who did not meet the definition of "legally adopted" due to the absence of formal state statutory adoption proceedings, and who were, therefore, explicitly excluded under the Act.<sup>4</sup> Statutory language prohibiting the payment of social security disability benefits to claimants found not guilty by reason of insanity while such claimants are institutionalized at public expense should generally be construed broadly.<sup>5</sup>

Similarly, it was held that equitable principles could not increase benefits beyond the maximum family allowance authorized by the statute.<sup>6</sup>

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### Footnotes

- <sup>1</sup> § 4.
- <sup>2</sup> *Folsom v. Poteet*, 235 F.2d 937 (9th Cir. 1956).
- <sup>3</sup> *Sweeney v. Secretary of Health, Ed. and Welfare*, 379 F. Supp. 1098 (E.D. N.Y. 1974).

- 4 Craig v. Finch, 425 F.2d 1005, 10 A.L.R. Fed. 894 (5th Cir. 1970).  
5 Artz v. Barnhart, 214 F. Supp. 2d 459 (D.N.J. 2002), *aff'd*, 330 F.3d 170 (3d Cir. 2003).  
6 Burrow v. Finch, 431 F.2d 486 (8th Cir. 1970).
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## 70A Am. Jur. 2d Social Security and Medicare § 8

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### Part One. Social Security and SSI Benefits

#### I. Overview


#### B. Interpretation of the Social Security Act

##### 1. General Considerations

## § 8. Requirement that SSA follow federal court precedent; acquiescence rulings

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  6, 124.1 to 124.30

The Social Security Administration (SSA) will apply a circuit court of appeals decision which the SSA has determined to be in conflict with the SSA's interpretation of the Social Security Act or regulations, unless the Commissioner seeks further review of the decision or relitigates the issue presented in the decision. The decision is applied within the applicable circuit to claims at all levels of administrative adjudication, unless the holding by its nature applies only at particular levels of adjudication.<sup>1</sup>

SSA regulations provide that the SSA will issue an acquiescence ruling for a court of appeals decision that is not appealed or for which the SSA is unsuccessful on appeal. The ruling will describe the administrative case and the court decision, identify any decision involved, and explain how the SSA will apply the holding in the court decision, including, as necessary, how the holding relates to other decisions in the applicable circuit. Rulings are generally effective on the date of publication in the Federal Register.<sup>2</sup>

A claimant may request that a court of appeals decision be applied to an SSA determination or decision made between the date of the court decision and the date on which the ruling regarding the decision is published. The claimant must demonstrate that the ruling would change the SSA determination or decision. This may be done by submitting a statement which cites the ruling and indicates what finding or statement in the rationale of the determination or decision conflicts with the ruling. If the claimant makes this demonstration, the SSA will readjudicate the claim in accordance with the ruling at the last level at which the claim was adjudicated. Readjudication will be limited to consideration of any issue covered by the ruling and is subject to administrative and judicial review. However, a denial of a request for readjudication is not subject to further review. If a claimant

files a request for readjudication within the 60-day appeal period, and the request is denied, the time for filing an appeal on the merits of the claim will be extended to 60 days from the date that the request is denied.<sup>3</sup>

After the SSA has published an acquiescence ruling, it may decide to relitigate any issue in the ruling, but only if an activating event occurs and certain conditions are met. Activating events include an action by both Houses of Congress indicating that the court decision on which the ruling is based is inconsistent with Congressional intent, such as may be expressed in a joint resolution, an appropriations restriction, or enactment of legislation which affects a closely analogous body of law; a statement in a majority opinion of the same court of appeals indicating that the court might not follow its previous decision if a particular issue were presented again; subsequent court of appeals precedent in other circuits which supports the SSA's interpretation of the Social Security Act or regulations on any issue in question; or a subsequent Supreme Court decision presenting a reasonable legal basis for questioning the holding upon which the ruling is based. Conditions which must be met before an issue may be relitigated include concurrence of the General Counsel of the Department of Health and Human Services, after consulting with the Department of Justice, that relitigation of the issue and application of the SSA's interpretation of the Social Security Act and regulations would be appropriate, and publication in the Federal Register of a notice stating the SSA's intent to relitigate an acquiescence ruling issue, and that the SSA will apply its interpretation of the Social Security Act and regulations to any claim selected for relitigation. The notice will explain why the SSA has decided to relitigate the issue.<sup>4</sup>

Notice of the SSA's decision to relitigate an issue will be provided to all affected claimants. In adjudicating claims subject to relitigation, decisionmakers throughout the SSA administrative review process will apply the SSA's interpretation of the Social Security Act and regulations, but will also state in written determinations or decisions how the claim would have been decided under the court of appeals standard. Claims not subject to relitigation will continue to be decided under the acquiescence ruling. A listing of all affected claimants will be maintained so that the claimants can be readily identified, and so that any subsequent decision of the court of appeals or the Supreme Court can be implemented quickly and efficiently.<sup>5</sup>

An acquiescence ruling may be rescinded as obsolete by publishing a notice in the Federal Register whenever the Supreme Court or a court of appeals overrules or limits itself on an issue that was the basis of the ruling; when a federal law is enacted that removes the basis for the court decision on which the ruling is based; or when the SSA clarifies, modifies, or revokes the regulation or ruling that was the basis for the court decision on which the ruling is based, or publishes a new regulation addressing any issue which was the subject of the court decision, was not previously included in regulations, and the resolution of which was not compelled by statute or the Constitution.<sup>6</sup>

Unless and until a Social Security acquiescence ruling (AR) is issued determining that a final circuit court holding conflicts with the Agency's interpretation of the Social Security Act or regulations and explaining how SSA will apply such a holding, SSA decisionmakers continue to be bound by SSA's nationwide policy, rather than the court's holding, in adjudicating other claims within that circuit court's jurisdiction.<sup>7</sup>

Soc. Sec. Rul. 96-1p was issued to clarify longstanding Agency policy that, despite a district court decision which may conflict with SSA's interpretation of the Social Security Act or regulations, SSA adjudicators will continue to apply SSA's nationwide policy when adjudicating other claims within that district court's jurisdiction unless the court directs otherwise. Under the SSA's final acquiescence policy, acquiescence rulings apply to all levels of adjudication, not only to the ALJ and Appeals Council levels, unless a holding by its nature applies only to certain levels of adjudication. The Ruling further notes that the SSA acquiesces only in decisions of the federal circuit courts, and not in decisions of federal district courts within a circuit. Thus, despite a district court decision which may conflict with SSA's interpretation of the Social Security Act or regulations, SSA adjudicators will continue to apply SSA's nationwide policy when adjudicating other claims within that district court's jurisdiction unless the court directs otherwise such as may occur in a class action.<sup>8</sup>

Soc. Sec. Rul. 96-1p does not apply to the claims of New York disability claimants who are covered by a particular court-approved settlement.<sup>9</sup> Pursuant to this settlement, SSA adjudicators are instructed to follow Second Circuit law in deciding

disability claims of New York state residents, except when written instructions to the contrary are issued.<sup>10</sup> Courts in the Eighth Circuit have issued rulings requiring the application of the circuit's law by the SSA, but no formal settlement has been reached.<sup>11</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Claims by social security disability claimants against the Social Security Administration (SSA), alleging that SSA's termination of benefits on redetermination violated their due process rights and the Social Security Act's implementing regulations, arose under the Social Security Act, and were thus subject to Act's statutory judicial review bar; claimants asserted that benefits were unlawfully terminated, without adequate notice, which was predicated on their potential future entitlement to those benefits, and that claimants' claims had a constitutional basis did not change the fact that claims arose under the Act. [U.S. Const. Amend. 5](#); Social Security Act § 205, [42 U.S.C.A. § 405\(h\)](#); [20 C.F.R. § 404.988\(c\)\(1\)](#). [Justiniano v. Social Security Administration](#), [876 F.3d 14](#) (1st Cir. 2017).

## [END OF SUPPLEMENT]

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### Footnotes

- 1 [20 C.F.R. § 404.985\(a\)](#) (OASDI), [20 C.F.R. § 416.1485\(a\)](#) (SSI).
- 2 [20 C.F.R. § 404.985\(b\)](#) (OASDI), [20 C.F.R. § 416.1485\(b\)](#) (SSI).
- 3 [20 C.F.R. § 404.985\(b\)](#) (OASDI), [20 C.F.R. § 416.1485\(b\)](#) (SSI).
- 4 [20 C.F.R. § 404.985\(c\)](#) (OASDI), [20 C.F.R. § 416.1485\(c\)](#) (SSI).
- 5 [20 C.F.R. § 404.985\(d\)](#), [20 C.F.R. § 416.1485\(d\)](#) (SSI).
- 6 [20 C.F.R. § 404.985\(e\)](#) (OASDI), [20 C.F.R. § 416.1485\(e\)](#) (SSI).
- 7 Soc. Sec. Rul. 96-1p, [1996 WL 374182](#) (61 Fed. Reg. 34470-01 (July 2, 1996)).
- 8 Soc. Sec. Rul. 96-1p ([61 Fed. Reg. 34470](#) (7/2/96)).
- 9 [57 Fed. Reg. 43006](#) (9/17/92), referring to [Stieberger v. Sullivan](#), [792 F. Supp. 1376](#) (S.D. N.Y. 1992), modified, [801 F. Supp. 1079](#) (S.D. N.Y. 1992).
- 10 [57 Fed. Reg. 43006](#) (Sept. 17, 1992).
- 11 [Rogers v. Chater](#), [118 F.3d 600](#) (8th Cir. 1997); [Hutchison for Hutchison v. Chater](#), [99 F.3d 286](#) (8th Cir. 1996).

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## 70A Am. Jur. 2d Social Security and Medicare § 9

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### I. Overview


#### B. Interpretation of the Social Security Act

##### 1. General Considerations

## § 9. Weight to be accorded SSA's interpretations

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  6, 124.1 to 124.30

Social Security Administration interpretations of the Act are entitled to great weight and are sustained unless they are unreasonable or plainly inconsistent with the statutory language.<sup>1</sup> For example, the SSA's interpretation of a statutory definition of "disability" as requiring that a claimant's "inability to engage in any substantial gainful activity" last, or be expected to last, for at least 12 months, was upheld where it was based on a lawful construction of the statute.<sup>2</sup> The Commissioner's position that the ability to perform workfare assignments may be indicative of an ability to engage in substantial gainful employment, for the purposes of assessing a claimant's entitlement to SSI benefits, was found to be a permissible interpretation of statutory law and therefore is entitled to deference.<sup>3</sup>

SSA interpretations of the Act are not conclusive, however, and are not followed by the court when such rulings are clearly contrary to the intent of Congress or are made in reliance upon faulty legal assumptions.<sup>4</sup> The Secretary of Health and Human Services' interpretation, which was not developed contemporaneously with a regulation or statute, but was articulated 10 years later, and represented a stark change in the Secretary's previous position as to the meaning of a regulation, was entitled to little deference.<sup>5</sup> In addition, any SSA interpretation based on general common law principles will not be entitled to great deference.<sup>6</sup>



**Practice Tip:**

Social Security Rulings (SSR) do not have the force of law, but are binding on all components of the Social Security Administration,<sup>7</sup> including administrative law judges.<sup>8</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Relatively high level of deference under *Skidmore* was warranted with regard to Acquiescence Ruling governing standard of review for termination of Social Security disability insurance benefits, since Social Security Administration (SSA) had been entrusted with great deal of power by Congress, SSA had great deal of expertise in administering complex program which had existed for 56 years, SSA had consistently applied policy during past 20 years, and issue was of great importance to administration of program. Social Security Act, § 223(f), 42 U.S.C.A. § 423(f). *Hagans v. Commissioner of Social Sec.*, 694 F.3d 287 (3d Cir. 2012).

"Substantial deference" standard was applicable in reviewing Secretary of Department of Health and Human Services' (HHS) interpretation, through Provider Reimbursement Manual (PRM), of her own Medicare regulation; court's task was not to decide which among several competing interpretations best served the regulatory purpose, but rather, court had to defer to the Secretary's interpretation unless an alternative reading was compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation. 5 U.S.C.A. § 706(2)(A, E); 42 C.F.R. § 413.89(e). *Cove Associates Joint Venture v. Sebelius*, 848 F. Supp. 2d 13 (D.D.C. 2012).

## [END OF SUPPLEMENT]

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### Footnotes

- 1 [Brasher v. Celebrezze](#), 340 F.2d 413 (8th Cir. 1965).
- 2 [Barnhart v. Walton](#), 535 U.S. 212, 122 S. Ct. 1265, 152 L. Ed. 2d 330 (2002).
- 3 [Melville v. Apfel](#), 198 F.3d 45 (2d Cir. 1999).
- 4 [Social Sec. Bd. v. Nierotko](#), 327 U.S. 358, 66 S. Ct. 637, 90 L. Ed. 718, 162 A.L.R. 1445 (1946); [State of Minn. v. Apfel](#), 151 F.3d 742, 128 Ed. Law Rep. 643 (8th Cir. 1998).
- 5 [St. Luke's Methodist Hosp. v. Thompson](#), 182 F. Supp. 2d 765 (N.D. Iowa 2001), decision aff'd, 315 F.3d 984 (8th Cir. 2003).
- 6 [Edwards v. Califano](#), 619 F.2d 865 (10th Cir. 1980).  
For a discussion on the effect of and weight to be accorded SSA interpretations covered by the Program Operations Manual System (POMS), see § 16.
- 7 [Hendrix v. Barnhart](#), 313 F. Supp. 2d 1222 (D. Utah 2004).

8 [Bray v. Commissioner of Social Security Admin., 554 F.3d 1219 \(9th Cir. 2009\).](#)

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## 70A Am. Jur. 2d Social Security and Medicare § 10

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### Part One. Social Security and SSI Benefits

#### I. Overview


#### B. Interpretation of the Social Security Act

#### 2. Promulgation and Effect of Regulations

## § 10. SSA's authority to promulgate

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare 6, 124.1 to 124.30

The Act gives the Commissioner<sup>1</sup> power to make rules and regulations, to establish procedures necessary or appropriate for carrying out the provisions of the Act, and to adopt reasonable and proper rules and regulations governing the evidence used to establish benefit rights under the Act.<sup>2</sup> In promulgating rules and regulations, the Social Security Administration must follow the rule-making procedures involving publication<sup>3</sup> and the receipt of comments or some similar form of public participation<sup>4</sup> as set forth in the Administrative Procedure Act.<sup>5</sup>

Purely interpretive rulings are not subject to the notice and comment provisions of the APA pursuant to [5 U.S.C.A. § 553\(b\)](#).<sup>6</sup> The purpose of an interpretive rule is to explain how to apply a statutory standard, or a legislative or substantive rule, which is intended to fill in the gaps left by Congress in a complex legislative scheme. In general, an interpretive rule simply states what the administrative agency thinks the statute means and reminds affected parties of existing duties.<sup>7</sup> Similarly, a Social Security Administration policy, such as allowing nonphysician disability examiners to assist in determinations of residual functional capacity, is not a substantive rule and is therefore also not subject to the notice and comment requirements.<sup>8</sup> On the other hand, a rule establishing a substantive legal standard must be published as a regulation, with notice and an opportunity for public comment, and such a rule may not be retroactively applicable.<sup>9</sup> Where the SSA's new understanding of a regulation is fundamentally inconsistent with interpretations that preceded it, it is subject to the notice and comment requirements.<sup>10</sup>

The Commissioner must promulgate a regulation to implement a statute when it states, as does, for example, [42 U.S.C.A. § 1382\(c\)\(4\)\(B\)](#), that "The Commissioner of Social Security shall prescribe by regulation."<sup>11</sup> However, the courts have no authority to set a deadline within which the Commissioner is required to promulgate final regulations, particularly where there is no evidence that the Commissioner has unlawfully withheld or unreasonably delayed the regulations.<sup>12</sup>

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Footnotes

- 1 Regulatory authority was transferred to the Commissioner from the Secretary of Health and Human Services in a final rule, [62 Fed. Reg. 38448 \(July 18, 1997\)](#).
- 2 [42 U.S.C.A. § 405\(a\)](#).
- 3 [5 U.S.C.A. § 553\(b\)](#).
- 4 [5 U.S.C.A. § 553\(c\)](#).
- 5 For a discussion of rulemaking requirements under the Administrative Procedure Act, see [Am. Jur. 2d, Administrative Law §§ 152 to 189](#).
- 6 [Bailey v. Sullivan](#), 885 F.2d 52, 14 Fed. R. Serv. 3d 535 (3d Cir. 1989); [Hall v. Sebelius](#), 689 F. Supp. 2d 10 (D.D.C. 2009).
- 7 [Friedrich v. Secretary of Health and Human Services](#), 894 F.2d 829 (6th Cir. 1990).
- 8 [Goodnight v. Chater](#), 960 F. Supp. 1538 (D. Utah 1997).
- 9 [Cedars-Sinai Medical Center v. Shalala](#), 939 F. Supp. 1457 (C.D. Cal. 1996).
- 10 [Iyengar v. Barnhart](#), 233 F. Supp. 2d 5 (D.D.C. 2002) (decision not to issue social security numbers to legal aliens not eligible to work in United States).
- 11 [Newman v. Chater](#), 87 F.3d 358 (9th Cir. 1996).
- 12 [Rosetti v. Sullivan](#), 3 Nat'l Disability Law Rep. P 108, 1992 WL 220932 (E.D. Pa. 1992).

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## 70A Am. Jur. 2d Social Security and Medicare § 11

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### Part One. Social Security and SSI Benefits

#### I. Overview


#### B. Interpretation of the Social Security Act

#### 2. Promulgation and Effect of Regulations

## § 11. Requirement that SSA not exceed its statutory authority

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  6, 124.1 to 124.30

The Commissioner of the Social Security Administration has wide discretion to make regulations that are necessary, appropriate, and consistent with the purpose of the empowering statute.<sup>1</sup> However, the SSA must not exceed its statutory authority, act arbitrarily or capriciously, or in any way abuse its discretion when it promulgates and enforces its regulations.<sup>2</sup> Those regulations must be reasonably related to the purposes of the Act.<sup>3</sup> For example, regulations found to be valid include those requiring written applications for benefits: they were deemed reasonably related to the valid purposes of reducing fraud, confusion, and laxity and of increasing accuracy in the administration of the Act.<sup>4</sup> A rule deleting the listing for obesity and adopting revised medical criteria was within the authority of the SSA to regulate and provide for the nature and extent of the proofs and evidence in social security disability benefits cases.<sup>5</sup> However, the SSA lacked statutory authority to apply revised medical criteria retroactively to a claim for supplemental security income (SSI) benefits based on obesity.<sup>6</sup>

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### Footnotes

- <sup>1</sup> [Sprandel v. Secretary of Health and Human Services](#), 838 F.2d 23 (1st Cir. 1988).
- <sup>2</sup> [Batterton v. Francis](#), 432 U.S. 416, 97 S. Ct. 2399, 53 L. Ed. 2d 448 (1977).
- <sup>3</sup> [Santise v. Schweiker](#), 676 F.2d 925 (3d Cir. 1982).
- <sup>4</sup> [Cheers v. Secretary of Health, Ed., and Welfare](#), 610 F.2d 463 (7th Cir. 1979).

5 [Keenan v. Barnhart, 375 F. Supp. 2d 1335 \(W.D. Okla. 2003\).](#)

6 [Cherry v. Barnhart, 327 F. Supp. 2d 1347 \(N.D. Okla. 2004\).](#)

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## 70A Am. Jur. 2d Social Security and Medicare § 12

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### Part One. Social Security and SSI Benefits

#### I. Overview


#### B. Interpretation of the Social Security Act

#### 2. Promulgation and Effect of Regulations

## § 12. Requirement that SSA not issue overly restrictive regulations

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  6, 124.1 to 124.30

The Social Security Administration cannot add administrative restrictions unintended in the statute to the rules and regulations that it constructs.<sup>1</sup> For example, regulations that were voided as overly restrictive include—

- a regulation that excluded from coverage under the Act's disability provisions a psychiatric condition which was in fact disabling within the definition provided in the Act.<sup>2</sup>
- one requiring that diabetes mellitus progress to amputation stage, rather than merely to the point of making one incapable of work, in order to qualify as a disability under the Act.<sup>3</sup>
- those regulations imputing as unearned income, for purposes of supplemental security income eligibility, differences between fair market rental value and rent actually paid for shelter, even though those funds were not readily available to the recipient, because the regulations were too restrictive and inconsistent with others properly construing the Act.<sup>4</sup>

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### Footnotes

<sup>1</sup> [Lee v. Gardner](#), 267 F. Supp. 578 (W.D. Mo. 1967).

<sup>2</sup> [Clements v. Celebrezze](#), 216 F. Supp. 78 (W.D. Va. 1963).

3 [Nickles v. Richardson, 326 F. Supp. 777 \(D.S.C. 1971\).](#)

4 [Jackson v. Schweiker, 683 F.2d 1076 \(7th Cir. 1982\).](#)

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## 70A Am. Jur. 2d Social Security and Medicare § 13

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### I. Overview


#### B. Interpretation of the Social Security Act

#### 2. Promulgation and Effect of Regulations

## § 13. Liberal construction

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare , 124.1 to 124.30

Like the Act itself,<sup>1</sup> the SSA's regulations are given a liberal interpretation to avoid denying benefits to persons whom the statute was designed to protect.<sup>2</sup>

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### Footnotes

- <sup>1</sup> § 4.  
<sup>2</sup> [Marion v. Gardner](#), 359 F.2d 175 (8th Cir. 1966); [Graham v. Barnhart](#), 278 F. Supp. 2d 1251 (D. Kan. 2003).

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## 70A Am. Jur. 2d Social Security and Medicare § 14

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### Part One. Social Security and SSI Benefits

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#### B. Interpretation of the Social Security Act

#### 3. SSA Publications as Guidelines for Interpretation

## § 14. SSA publications as aids to interpreting Act

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare 6, 124.1 to 124.30

Although they have no force of law in themselves, certain SSA publications are of definite but varying usefulness in ascertaining the meaning and effects of the law governing social security. They include the Program Operations Manual System,<sup>1</sup> Social Security Rulings of the SSA,<sup>2</sup> and HALLEX<sup>3</sup> Mere reference to or characterization of an instruction in a procedural manual as a rule by the Commissioner is not dispositive of the character of the instruction or whether it must be subject to APA procedures.<sup>4</sup>

### Caution:

These publications do not have the force and effect of law, as do the regulations promulgated pursuant to the Act and the Administrative Procedure Act.<sup>5</sup>

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Footnotes

- 1                               § 16.
- 2                               § 9.
- 3                               § 17.
- 4                               Cedars-Sinai Medical Center v. Shalala, 939 F. Supp. 1457 (C.D. Cal. 1996).
- 5                               § 5.

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#### 3. SSA Publications as Guidelines for Interpretation

## § 15. Limited effect and value of Social Security Rulings

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  6, 124.1 to 124.30

A Social Security Ruling interpreting the Act and the SSA's regulations and applying them to a specific set of facts does not have the effect of law.<sup>1</sup> However, such rulings are precedents binding the SSA, although they may be modified by a law, regulation, court decision, overwhelming contrary evidence in a particular case, or subsequent ruling.<sup>2</sup> Moreover, a Social Security Ruling will be deferred to by a court unless it is unreasonable,<sup>3</sup> and is accorded especially great weight and deference when the language of the Act is unclear and the legislative history provides no guidance.<sup>4</sup>

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### Footnotes

- <sup>1</sup> [Wagner v. Finch](#), 413 F.2d 267 (5th Cir. 1969).
- <sup>2</sup> [OHA Handbook § 1-161](#); [Cabral v. Heckler](#), 604 F. Supp. 831 (N.D. Cal. 1984); [Watts v. Bowen](#), 1987 WL 7803 (N.D. Ill. 1987).
- <sup>3</sup> [Capitano v. Secretary of Health and Human Services](#), 732 F.2d 1066 (2d Cir. 1984); [Chavez v. Department of Health and Human Services](#), 103 F.3d 849 (9th Cir. 1996).
- <sup>4</sup> [B. B. v. Schweiker](#), 643 F.2d 1069 (5th Cir. 1981).

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## 70A Am. Jur. 2d Social Security and Medicare § 16

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#### 3. SSA Publications as Guidelines for Interpretation

## § 16. Value of Program Operations Manual System (POMS)

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  6, 124.1 to 124.30

While Program Operations Manual System (POMS) guidelines do not have the force and effect of law, they do have some value, effect, and persuasive force.<sup>1</sup> POMS are not binding on the Commissioner,<sup>2</sup> but they may be viewed as binding on an ALJ in a case that falls squarely within one of the provisions.<sup>3</sup>

In addition, the Disability Operational Policy and Procedures Information Digest, an SSA policy manual, is an interpretive tool to be harmonized with regulations, and does not alter or limit definitions contained in the regulations.<sup>4</sup>

It has been held that the SSA was not bound to follow provisions of the Claims Manual, which preceded POMS and consisted of solely internal agency guidelines devoid of the force of law or regulation.<sup>5</sup> However, like the assertions made in POMS, statements contained in the Claims Manual were an indication of the SSA's interpretation of the law and were followed in the absence of firm law to the contrary or compelling indications that they were wrong.<sup>6</sup>

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### Footnotes

<sup>1</sup> [Tejada v. Apfel](#), 167 F.3d 770 (2d Cir. 1999); [Bubnis v. Chater](#), 958 F. Supp. 111 (E.D. N.Y. 1997), judgment aff'd, 150 F.3d 177 (2d Cir. 1998); [Colavito v. Apfel](#), 75 F. Supp. 2d 385 (E.D. Pa. 1999).

- 2                    [Berger v. Apfel](#), 200 F.3d 1157 (8th Cir. 2000).  
3                    [Sabo v. Chater](#), 955 F. Supp. 1456 (M.D. Fla. 1996).  
4                    [Thomas v. Secretary of Health and Human Services](#), 659 F.2d 8 (1st Cir. 1981).  
5                    [Thomas v. Secretary of Health and Human Services](#), 659 F.2d 8 (1st Cir. 1981).  
6                    [Chamberlain v. Schweiker](#), 518 F. Supp. 1336 (C.D. Ill. 1981); [Wilson v. Apfel](#), 81 F. Supp. 2d 649 (W.D. Va. 2000).

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## 70A Am. Jur. 2d Social Security and Medicare § 17

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## § 17. Office of Hearings, Appeals, and Litigation Law Manual (HALLEX)

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  6, 124.1 to 124.30

The Office of Hearings, Appeals, and Litigation Law Manual (HALLEX) is the means by which the Associate Commissioner of Hearings and Appeals conveys guiding principles, procedural guidance and information to the Office of Hearings and Appeals (OHA) staff. HALLEX includes policy statements resulting from an Appeals Council en banc meeting under the authority of the Appeals Council Chair. It also defines procedures for carrying out policy and provides guidance for processing and adjudicating claims at the Hearing, Appeals Council and Civil Actions levels.<sup>1</sup> The HALLEX Manual does not carry the authority of law.<sup>2</sup>

It is SSA policy not to refer to HALLEX in decisions or in correspondence unless there are compelling reasons to do so.<sup>3</sup>

Each OHA headquarters office and field office is required to have HALLEX for public inspection and copying under the Freedom of Information Act. In OHA Headquarters, the FOIA staff in the Office of Policy, Planning and Evaluation is responsible for making HALLEX available for public inspection and copying.<sup>4</sup>

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### Footnotes

<sup>1</sup> HALLEX I-1-0-1, 2005 WL 1863821 (last updated June 21, 2005).

<sup>2</sup> *Newton v. Apfel*, 209 F.3d 448 (5th Cir. 2000).

3 [HALLEX I-1-0-4\(B\), 1993 WL 643229 \(last updated June 21, 2005\).](#)

4 [HALLEX I-1-0-4\(D\), 1993 WL 643229 \(last updated June 21, 2005\).](#)

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## 70A Am. Jur. 2d Social Security and Medicare § 18

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## § 18. Use of materials from the Centers for Medicare and Medicaid Services (CMS)

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Health](#)  465, 512(1), 523, 557(2)

West's Key Number Digest, Social Security and Public Welfare  6, 124.1 to 124.30

The Centers for Medicare and Medicaid Services (CMS) was formerly called the Health Care Financing Administration (HCFA); it was renamed effective July 5, 2001.<sup>1</sup> CMS is a branch of the U.S. Department of Health and Human Services which administers the Medicare program and monitors the Medicaid programs offered by each state.<sup>2</sup>

HCFA (now CMS) rulings were described as interpretive regulations which are binding on administrative law judges (ALJs) and the Appeals Council, and are entitled to deference by the courts when based upon medical expertise uniquely within its competence and upon an open, comprehensive, and authoritative exploration of the issues involved in a particular ruling. If ALJs and the Appeals Council rule in favor of individual claimants, in conflict with manual instructions which are binding only on carriers, the Commissioner has the discretion to issue a formal CMS ruling to bind the ALJs and the Appeals Council to the same policy instructions as are binding on the carriers.<sup>3</sup>

Like similar Social Security Administration publications,<sup>4</sup> the CMS manuals<sup>5</sup> and other CMS interpretive policy statements which merely set forth the CMS's interpretation of the law and regulations, do not make new law but may have persuasive weight.<sup>6</sup> CMS interpretations that are entirely consistent with federal and state statutory and regulatory frameworks are entitled to respect and some deference by appellate courts.<sup>7</sup> CMS policy manuals and statements need not be published in the Federal Register since they are only statements of general policy that do not constitute a change from existing practice and do not have

a significant impact on a segment of those regulated.<sup>8</sup> However, a manual provision that does not comply with the notice and publication requirements of the Administrative Procedure Act<sup>9</sup> may be invalid for the purpose of denying coverage where the rule carves out a per se exception to an existing regulation and effects a substantive change in law.<sup>10</sup>

Unless specific CMS manual provisions conflict with the Act or the regulations, an administrative law judge can properly rely on them to deny coverage.<sup>11</sup> However, the Ninth Circuit has held that it was not required to give deference to a Medicare manual's provision interpreting the Medicare regulations about expenses that are not allowable costs. The court concluded defining what is necessary medical treatment is not one of those areas in which the CMS has sufficient expertise to be given the responsibility to make such a determination.<sup>12</sup>

**Practice Tip:**

A rule providing that clotting time tests are not to be billed separately from a basic dialysis charge, which affects the amount of reimbursement received by a Medicare provider, is not void because the HCFA (now CMS) did not publish the new rule in the Federal Register and allow comment, as provided in the Administrative Procedure Act (5 U.S.C.A. § 553(b), (c)), but instead issued the rule as an intermediary letter and as part of a Medicare Manual, since notice and comment is not required for interpretative rather than substantive rules. The rule clarified the area and was therefore an interpretation of existing law, not an attempt to create substantive law.<sup>13</sup>

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**Footnotes**

- 1 66 Fed. Reg. 35437-03 (July 5, 2001).
- 2 CMS, "What Is CMS?," located at CMS website, [www.cms.gov](http://www.cms.gov).
- 3 Wilkins v. Secretary of Health and Human Services, Medicare & Medicaid P 37801, 1989 WL 265473 (C.D. Ill. 1989).
- 4 § 8.
- 5 CMS manuals have included the Carriers Manual, Home Health Agency Manual, Hospice Manual, Hospital Manual, and Skilled Nursing Facilities Manual.
- 6 Estate of Landers v. Leavitt, 545 F.3d 98 (2d Cir. 2008), as revised, (Jan. 15, 2009) and cert. denied, 129 S. Ct. 2878, 174 L. Ed. 2d 580 (2009).
- 7 Caremark, Inc. v. Goetz, 480 F.3d 779 (6th Cir. 2007).
- 8 Friedrich v. Secretary of Health and Human Services, 894 F.2d 829 (6th Cir. 1990); Linoz v. Heckler, 800 F.2d 871 (9th Cir. 1986).
- 9 5 U.S.C.A. § 553.
- 10 Linoz v. Heckler, 800 F.2d 871 (9th Cir. 1986).
- 11 Hatcher v. Heckler, 772 F.2d 427 (8th Cir. 1985).
- 12 Vista Hill Foundation, Inc. v. Heckler, 767 F.2d 556 (9th Cir. 1985).
- 13 Bio-Medical Applications of Providence, Inc. v. Heckler, 593 F. Supp. 1233 (D.D.C. 1984), judgment aff'd, 776 F.2d 365 (D.C. Cir. 1985).

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## Research References

### West's Key Number Digest


West's Key Number Digest, Social Security and Public Welfare  124.16 to 124.30

### Primary Authority

[42 U.S.C.A. §§ 401 to 434, 901, 1381 to 1383f, 1395i](#)

### A.L.R. Library

A.L.R. Index, Social Security

West's A.L.R. Digest, Social Security and Public Welfare  [124.16](#) to [124.30](#)

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## § 19. Generally

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### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  124.16 to 124.30

The Social Security Administration (SSA), under the direction of the Commissioner of Social Security, administers the old age, survivors', and disability insurance (OASDI) program under Title II of the Social Security Act<sup>1</sup> and the supplemental security income (SSI) program under Title XVI<sup>2</sup> of the Act.<sup>3</sup> The SSA also has the responsibility to determine who is eligible to receive hospital insurance coverage under Medicare.<sup>4</sup>

The Centers for Medicare and Medicaid Services (CMS) oversees the provider reimbursement functions of the Medicare and Medicaid programs.<sup>5</sup>

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### Footnotes

- <sup>1</sup> 42 U.S.C.A. §§ 401 to 434.
- <sup>2</sup> 42 U.S.C.A. §§ 1381 to 1383f.
- <sup>3</sup> 42 U.S.C.A. § 901.
- <sup>4</sup> §§ 1907 to 1917.
- <sup>5</sup> §§ 1907 to 1917.

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## § 20. Trust funds

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  124.16 to 124.30

The Social Security Act establishes a Federal Old-Age and Survivors Insurance Trust Fund,<sup>1</sup> a Federal Disability Insurance Trust Fund,<sup>2</sup> and a Federal Hospital insurance Trust Fund.<sup>3</sup> These trust funds are part of the United States Treasury. The statutes specify who are included in the Boards of Trustees which administer the funds, and the powers of the trustees and transactions that may be undertaken by the funds, including inter-fund borrowing under some circumstances.<sup>4</sup>

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#### Footnotes

- <sup>1</sup> 42 U.S.C.A. § 401(a).
- <sup>2</sup> 42 U.S.C.A. § 401(b).
- <sup>3</sup> 42 U.S.C.A. § 1395i(a).
- <sup>4</sup> 42 U.S.C.A. §§ 401, 1395i.

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## Research References

### West's Key Number Digest

West's Key Number Digest, [Health](#)  [525](#)

West's Key Number Digest, Social Security and Public Welfare  [121](#), [135.1](#) to [138](#), [140.5](#) to [149.5](#)

### Primary Authority

[42 U.S.C.A. § 1304](#)

### A.L.R. Library

A.L.R. Index, Social Security

West's A.L.R. Digest, [Health](#)  [525](#)

West's A.L.R. Digest, Social Security and Public Welfare  [121](#), [135.1](#) to [138](#), [140.5](#) to [149.5](#)

### Treatises and Practice Aids

[Social Security Law and Practice §§ 13:1 to 13:44, 21:1 to 21:85](#)

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### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  121, 135.1 to 138

Old-Age, Survivors, and Disability Insurance (OASDI) is a retirement insurance program for people working in the United States. Also known as Social Security, its purpose is to provide workers and their families with payments at an age when earnings are likely to diminish by reason of old age or illness.<sup>1</sup> Premiums are deducted from a worker's wages or salary in order to pay for coverage.<sup>2</sup> When a worker dies, retires, or becomes incapable of working due to a medical impairment, the worker and the worker's family or survivors may become eligible to receive Social Security payments. The overriding purpose of the social security laws relative to dependents is to provide benefits to those who were most likely to have relied upon the decedent for their support.<sup>3</sup> However, Congress is not obligated to provide benefits for every individual who might conceivably have been dependent on a wage earner for support.<sup>4</sup>

### Observation:

Different rules may apply to persons who have been employed or who are related to persons who have been employed in the railroad industry under the Railroad Retirement Act.<sup>5</sup>

The Social Security Act provides that in addition to their monthly benefits checks, aged and disabled recipients of social security benefits are entitled to certain health care benefits under the Medicare Part A program.<sup>6</sup>

The Social Security Act provides a supplemental medical insurance program known as Medicare Part B.<sup>7</sup> Under the supplemental medical insurance program, aged and disabled recipients of social security benefits may receive assistance in payment of their physicians and other health care expenses not covered under the hospital insurance program, known as Medicare Part A.<sup>8</sup> Payments received under the Medicare Part B program are subject to certain deductibles before any services are covered.<sup>9</sup>

Supplemental Security Income (SSI) is a federalized system of needs-tested benefits for aged (65 or older), blind, and disabled people. SSI differs from social security benefits in that it is based on a claimant's financial need rather than on employment history. Thus, in addition to the requirements that the claimant be aged, blind, or disabled, the claimant must have countable income and resources below certain levels established by the Federal Government.<sup>10</sup>

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#### Footnotes

- 1 [Brown v. Bowen](#), 905 F.2d 632 (2d Cir.1990).
- 2 [Collins v. Celebrezze](#), 250 F. Supp. 37 (S.D. N.Y. 1966).
- 3 [Watts v. Veneman](#), 476 F.2d 529 (D.C. Cir. 1973).
- 4 [Garner v. Richardson](#), 333 F. Supp. 1191 (N.D. Cal. 1971).
- 5 [Am. Jur. 2d, Pensions and Retirement Funds §§ 888 to 1064.](#)
- 6 [§§ 1904 to 1926.](#)
- 7 [§§ 2104 to 2195.](#)
- 8 [§ 21.](#)
- 9 [§§ 2149 to 2151.](#)
- 10 [§§ 1023, 1202 to 1301.](#)

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## 70A Am. Jur. 2d Social Security and Medicare § 22

American Jurisprudence, Second Edition | May 2021 Update

### Social Security and Medicare

George Blum, J.D., John Bourdeau, J.D., Kerry M. Diggin, J.D., Romualdo P. Eclavea, J.D., Edward K. Esping, J.D., Tracy Bateman Farrell, J.D., Jill Gustafson, J.D., Janice Holben, J.D., Alan J. Jacobs, J.D., Anne Knickerbocker, J.D., Jack K. Levin, J.D., Anne E. Melley, J.D., LL.M., Tom Muskus, J.D., Karl Oakes, J.D., Eric C. Surette, J.D., and Barbara J. Van Arsdale, J.D.

### Part One. Social Security and SSI Benefits

#### I. Overview

#### D. Character of, and Eligibility for, Benefits

## § 22. Vesting or defeasance of benefits

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  121, 135.1

Social security benefits are not vested in a property sense, in that they are subject to defeasance by act of Congress so long as that action is not arbitrary.<sup>1</sup> Changing economic conditions may require that the program be modified, and engrafting on the system a concept of accrued property rights would deprive it of the flexibility needed to adjust to ever-changing conditions.<sup>2</sup> Thus, the noncontractual interest of an employee covered by the Social Security Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his or her contractual premium payments.<sup>3</sup> Similarly, an expectation interest in public benefits does not confer a contractual right to receive the expected amounts.<sup>4</sup>

On the other hand, although Congress expressly reserved the right to alter, amend, or repeal any provision of the Act,<sup>5</sup> it may not exercise its power to modify the statutory scheme free of all constitutional restraints, the interest of a covered employee under the Act being of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause.<sup>6</sup> However, this protection may not accrue until the claimant has been paid benefits or there has been an adjudication in his or her favor.<sup>7</sup> Indeed, the mere fact that Congress made a change in an applicable provision of the Social Security Act due to its apparent dissatisfaction with a judicial interpretation of the provision does not constitute an unconstitutional abridgment of the separation of powers doctrine or a denial of procedural due process, even though the claimant's entitlement to benefits prescribed by that statute is being litigated in a pending case.<sup>8</sup>

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Footnotes

- 1                   Guarino v. Celebrezze, 336 F.2d 336 (3d Cir. 1964).
- 2                   Bowen v. Public Agencies Opposed To Social Sec. Entrapment, 477 U.S. 41, 106 S. Ct. 2390, 91 L. Ed. 2d 35 (1986); Flemming v. Nestor, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960); King v. Finch, 428 F.2d 709 (5th Cir. 1970).
- 3                   Flemming v. Nestor, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960).
- 4                   Richardson v. Belcher, 404 U.S. 78, 92 S. Ct. 254, 30 L. Ed. 2d 231 (1971).
- 5                   42 U.S.C.A. § 1304.
- 6                   Flemming v. Nestor, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960).
- 7                   King v. Finch, 428 F.2d 709 (5th Cir. 1970).
- 8                   King v. Finch, 428 F.2d 709 (5th Cir. 1970).

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## 70A Am. Jur. 2d Social Security and Medicare One II A Refs.

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### Part One. Social Security and SSI Benefits


#### II. Coverage of Employers and Employees

##### A. Covered Employment

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

### Primary Authority

[8 U.S.C.A. §§ 1101 to 1537](#)

[22 U.S.C.A. §§ 288 to 288f, 2451 to 2464](#)

[26 U.S.C.A. §§ 501, 509, 3101 to 3128, 7701](#)

[38 U.S.C.A. § 101](#)

[42 U.S.C.A. §§ 401, 410, 418](#)

[Pub. L. No. 85-857](#)

[Pub. L. No. 98-21](#)

[Pub. L. No. 103-296](#)

[20 C.F.R. §§ 404.1013, 404.1014, 404.1030\(b\)](#)

[26 C.F.R. §§ 1.509\(a\)-4, 31.3121](#)


[I.R.S. Pub. 519, U.S. Tax Guide for Aliens, 2010 WL 6064593](#)

[Soc. Sec. Rul. 86-11c, 1986 WL 68670 \(SSA\) \(July 1, 1986\)](#)

[Social Security Handbook §§ 920.1, 922, 923, 929.1 to 929.3, 939.1, 950 to 952, 962, 968.2, 1119.1, 1120.1 to 1120.5](#)

### A.L.R. Library

A.L.R. Index, Social Security

West's A.L.R. Digest, Social Security and Public Welfare  [125.1](#) to [134](#)

**Treatises and Practice Aids**

RIA Federal Tax Coordinator 2d, Tax Treaties ¶¶ O-15000 to O-15034

RIA Federal Tax Coordinator 2d, Exempt Organizations, Private Foundations ¶ D-4141

[Social Security Law and Practice §§ 71:1 to 71:24](#)

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## 70A Am. Jur. 2d Social Security and Medicare § 23

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 1. In General

## § 23. Basic coverage rules

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed after 1954 within the United States by an employee for an employer constitute covered employment, unless specifically excepted.

Where service is performed within the United States, the place where the contract of service is entered into is immaterial. The citizenship or residence of the employee or of the employer is immaterial except for:

- (1) service performed by foreign agricultural workers;<sup>1</sup>
- (2) service performed in Guam by a resident of the Philippines;<sup>2</sup> and
- (3) service performed by a nonresident alien temporarily present in the United States.<sup>3</sup>

Thus, the employee and the employer may be citizens and residents of a foreign country, and the contract of service may be entered into in a foreign country and yet, if the employee under such contract performed services within the United States, there would be employment.<sup>4</sup>

The included-excluded rule<sup>5</sup> does not apply where part of the work is performed within the United States for a foreign employer and part is performed outside the United States.<sup>6</sup>

Employment by a political organization which has more than four regular employees is employment for FICA purposes.<sup>7</sup>

**Definition:**

The "United States" includes the 50 states as well as the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and the Territories of Alaska and Hawaii before their admission as states. The United States also includes Guam and American Samoa when used with respect to services performed after 1960.<sup>8</sup>

A "state" includes the 50 states, as well as the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and the Territories of Alaska and Hawaii before their admission as states. It also includes Guam and American Samoa when used with respect to services performed after 1960.<sup>9</sup>

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Footnotes

- 1 § 50.
- 2 § 46.
- 3 § 42.
- 4 26 U.S.C.A. § 3121(b); 26 C.F.R. §§ 31.3121(b)-1(a), 31.3121(b)-3(a), (b).
- 5 § 59.
- 6 *Inter-City Truck Lines, Limited v. U. S.*, 187 Ct. Cl. 290, 408 F.2d 686 (1969).
- 7 Rev. Rul. 68-190, 1968-1 C.B. 442.
- 8 26 U.S.C.A. § 3121(e)(2); 26 C.F.R. § 31.3121(e)-1(b).
- 9 26 U.S.C.A. § 3121(e)(1); 26 C.F.R. § 31.3121(e)-1(a).

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## 70A Am. Jur. 2d Social Security and Medicare § 24

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 1. In General

## § 24. Services performed by an American Indian

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare 125.1 to 134

Services performed by an American Indian employee are not excepted from the term "employment" merely because the employee is a ward of the United States.<sup>1</sup>

There are special rules, however, regarding services performed for Indian tribal councils and for tribal business enterprises:

- services performed by members of the tribal councils in their capacities as council members do not constitute employment
- services performed by other salaried employees of tribal councils constitute employment
- services by employees of tribal business enterprises constitute employment; where a business enterprise of an Indian tribe is organized and operated by the tribe itself, the enterprise is considered a private tribal activity and the services performed in its employ constitute employment<sup>2</sup>

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### Footnotes

<sup>1</sup> [Rev. Rul. 68-493, 1968-2 C.B. 426.](#)

<sup>2</sup> [Rev. Rul. 59-354, 1959-2 C.B. 24.](#)

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## 70A Am. Jur. 2d Social Security and Medicare § 25

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 1. In General

## § 25. Services performed before 1955 for which the remuneration is paid after 1954

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Remuneration paid after 1954 for services performed before 1955 is subject to FICA the same as remuneration paid for services performed after 1954 is to the extent that the remuneration and services constitute wages and employment.<sup>1</sup>

Such services constituting employment include—

— services not in the course of the employer's trade or business which, at the time performed, constituted employment under section 1426(b) of the 1939 Code, or would have constituted employment except for the provisions of section 1426(b)(3) of that Code, as in effect at the time the services were performed.<sup>2</sup>

— certain agricultural labor.<sup>3</sup>

— services performed by foreign agricultural workers before 1955 for which the remuneration is paid after 1954 do not constitute employment, regardless of whether they constitute employment under § 1426(b) of the 1939 Code.<sup>4</sup>

If the services were performed before 1955 and were paid for before 1955, the rules described above are not applicable.<sup>5</sup>

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Footnotes

- 1 26 C.F.R. § 31.3121(b)-1(b).
- 2 26 C.F.R. § 31.3121(b)-2(b)(1)(ii).
- 3 §§ 431 to 448.
- 4 26 C.F.R. § 31.3121(b)-2(b)(2).
- 5 26 C.F.R. § 31.3121(b)-2(b)(3).

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## 70A Am. Jur. 2d Social Security and Medicare § 26

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 1. In General

## § 26. Services performed by Canadian citizens or residents

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

The Internal Revenue Service has issued several rulings on the FICA taxability of income earned by Canadians.

Services performed in the United States for a Canadian employer by truck drivers who are not citizens of the United States and who are residents of Canada, are included in employment. The truck drivers enter and leave the United States at frequent intervals. Employment generally includes services performed within the United States, regardless of the citizenship or residence of either the employee or the employer.<sup>1</sup>

A Canadian company employs Canadian citizens as truck drivers for the delivery and pick up of shipments in the United States. In every pay period each employee performs services for less than half of the time within the United States. Services performed within the United States are included in employment, regardless of the citizenship or residency of the employee or the employer. However, if the services performed during more than half of a pay period do not constitute employment, then none of the services is deemed employment. However, this included/excluded rule only applies to services performed inside the United States or outside the United States by a U.S. citizen for an American employer. Since the included/excluded rule does not apply to services performed outside the United States by a foreign citizen for a foreign employer, services performed within the United States by Canadian citizens for a Canadian company are employment.<sup>2</sup>

A resident of Canada is temporarily visiting the United States for the purpose of teaching at a university in the United States. The university is exempt from income tax but had waived its exemption from FICA tax. Although a tax convention between

the United States and Canada provides that a resident of Canada who is temporarily visiting the United States for the purpose of teaching, for a period not exceeding two years, at a university, college, school or other educational institution in the United States shall be exempt from tax, that convention does not affect FICA taxes. Thus, services performed by the Canadian resident for teaching at the university while temporarily in the United States are included in employment.<sup>3</sup>

A Canadian company purchases equipment in the United States to distribute in Canada. Usually representatives of U.S. manufacturers visit the company's offices in Canada to solicit business. The company is not engaged in business in the United States and does not maintain any facility, office, or agency in the United States. The company employs a U.S. citizen as an engineer to visit manufacturers in the United States to see if its equipment is engineered properly and suitable for the Canadian market. The engineer is paid by check mailed from Canada. The engineer resides in and maintains a business office in State X. The engineer performs all of the services for the Canadian company within the United States. Services performed within the United States are employment, generally, regardless of the citizenship or residence of the employee or the employer. These services are employment.<sup>4</sup>

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#### Footnotes

- |   |   |
|---|---|
| 1 | <a href="#">Rev. Rul. 66-77, 1966-1 C.B. 242.</a>   |
| 2 | <a href="#">Rev. Rul. 79-318, 1979-2 C.B. 352.</a>  |
| 3 | <a href="#">Rev. Rul. 56-609, 1956-2 C.B. 1066.</a> |
| 4 | <a href="#">Rev. Rul. 79-391, 1979-2 C.B. 352.</a>  |

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## 70A Am. Jur. 2d Social Security and Medicare § 27

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

##### A. Covered Employment


##### 2. Service Outside the United States

##### a. Vessels and Aircraft

## § 27. Services performed after 1954 outside the United States

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

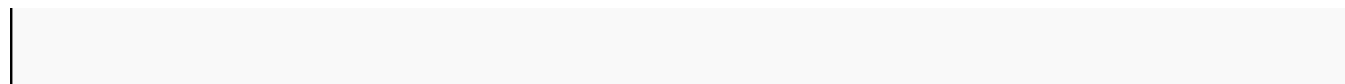
West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

With the exception of service performed on or in connection with an American vessel or American aircraft,<sup>1</sup> and services performed by a citizen or resident of the United States as an employee for an American employer,<sup>2</sup> services performed outside the United States do not constitute employment.<sup>3</sup>

### Definition:

An "American vessel" is any vessel documented or numbered under the laws of the United States. It also includes any vessel, although neither documented or numbered under the laws of the United States, nor documented under the laws of any foreign country, if its crew is employed solely by either one or more citizens or residents of the United States, or by corporations organized under the laws of the United States or any state.<sup>4</sup>

An "American aircraft" means any aircraft registered under the laws of the United States.<sup>5</sup>



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Footnotes

- 1 § 28.
- 2 § 31.
- 3 26 C.F.R. § 31.3121(b)-3(c).
- 4 26 U.S.C.A. § 3121(f); 26 C.F.R. § 31.3121(f)-1(a).
- 5 26 U.S.C.A. § 3121(f); 26 C.F.R. § 31.3121(f)-1(b).

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## 70A Am. Jur. 2d Social Security and Medicare § 28

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

##### A. Covered Employment


##### 2. Service Outside the United States

##### a. Vessels and Aircraft

### § 28. Service performed after 1954 on or in connection with an American vessel or American aircraft

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed by an employee for an employer on or in connection with an American vessel or American aircraft constitute employment if:

- (1) the employee is also employed "on or in connection with" the vessel or aircraft when outside the United States;
- (2) the services are performed under a contract of service between the employee and the employer, which is entered into within the United States or during the performance of the contract under which the services are performed and while the employee is employed on the vessel or aircraft, it touches at a port within the United States; and
- (3) the services are not otherwise excepted.<sup>1</sup>

An employee performs services "on and in connection with" the vessel or aircraft if the employee performs services on the vessels or aircraft which are also in connection with the vessel or aircraft. Services performed on the vessel by employees as officers or members of the crew, or as employees of concessionaires, of the vessel are performed under such circumstances, since such services are also connected with the vessel. Similarly, services performed on the aircraft by employees as officers or members of the crew of the aircraft are performed on and in connection with such aircraft.<sup>2</sup>

Services may be performed on the vessel or aircraft, however, which have no connection with it, e.g., services performed by an employee while on the vessel or aircraft merely as a passenger. For example, the services of a buyer in the employ of a department store while a passenger on a vessel are not in connection with the vessel.<sup>3</sup>

If services are performed by an employee "on and in connection with" an American vessel or American aircraft when outside the United States and conditions (2) and (3) above are met, then the services of that employee performed on or in connection with the vessel or aircraft constitute employment.<sup>4</sup>

The expression "on or in connection with" refers not only to services performed on the vessel or aircraft but also to services connected with the vessel or aircraft which are not actually performed on it (for example, shore services performed as officers or members of the crew, or as employees of concessionaires, of the vessel).<sup>5</sup>

Services performed by a member of the crew or other employee whose contract of service is not entered into within the United States, and during the performance of which and while the employee is employed on the vessel or aircraft it does not touch at a port within the United States, do not constitute employment even though services performed by other members of the crew or other employees on or in connection with the vessel or aircraft may constitute employment.<sup>6</sup>

For services performed outside the United States on or in connection with an American vessel or American aircraft, the citizenship or residence of the employee is immaterial, and the citizenship or residence of the employer is material only in case it has a bearing in determining whether a vessel is an American vessel.<sup>7</sup>

A vessel includes every description of watercraft, or other contrivance, used as a means of transportation on water. An aircraft includes every description of craft, or other contrivance, used as a means of transportation through the air. In the case of an aircraft, the term "port" means an airport. An airport means an area on land or water used regularly by aircraft for receiving or discharging passengers or cargo.<sup>8</sup>

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#### Footnotes

1 26 U.S.C.A. § 3121(b); 26 C.F.R. § 31.3121(b)-3(c)(2)(i).

2 26 C.F.R. § 31.3121(b)-3(c)(2)(ii).

3 26 C.F.R. § 31.3121(b)-3(c)(2)(ii).

4 26 C.F.R. § 31.3121(b)-3(c)(2)(iii).

5 26 C.F.R. § 31.3121(b)-3(c)(2)(iii).

6 26 C.F.R. § 31.3121(b)-3(c)(2)(iv).

7 26 C.F.R. § 31.3121(b)-3(c)(2)(vi).

8 26 C.F.R. § 31.3121(b)-3(c)(2)(v).

For the definition of "American vessel" and "American aircraft," see § 27.

## 70A Am. Jur. 2d Social Security and Medicare § 29

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

##### A. Covered Employment


##### 2. Service Outside the United States

##### a. Vessels and Aircraft

## § 29. Service performed on or in connection with a non-American vessel or non-American aircraft

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed within the United States by an employee for an employer "on or in connection with" a vessel not an American vessel, or "on or in connection with" an aircraft not an American aircraft, are excepted from employment if the employee is employed by such employer "on and in connection with" such vessel or aircraft when outside the United States, and the employee is not a citizen of the United States, or the employer is not an American employer.<sup>1</sup>

Services performed within the United States for an employer, whether or not an American employer, on or in connection with a non-American vessel or aircraft by an employee, whether or not a U.S. citizen, who is not also employed by the employer on and in connection with the vessel or aircraft when outside the United States are not excepted from employment.<sup>2</sup>

Services performed outside the United States on or in connection with a non-American vessel, or on or in connection with a non-American aircraft, by a U.S. citizen as an employee for an American employer are not excepted from employment, regardless of whether the employee is employed on and in connection with such vessel or aircraft when outside the United States. Services performed outside the United States on or in connection with a non-American vessel or on or in connection with a non-American aircraft, either by an employee who is not a U.S. citizen or for an employer who is not an American employer, do not, in any event, constitute employment.<sup>3</sup>

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Footnotes

- 1 [26 U.S.C.A. § 3121\(b\)\(4\); 26 C.F.R. § 31.3121\(b\)\(4\)-1\(a\).](#)  
As to the phrase "on or in connection with", see [§ 30](#).
- 2 [26 C.F.R. § 31.3121\(b\)\(4\)-1\(d\).](#)
- 3 [26 C.F.R. § 31.3121\(b\)\(4\)-1\(e\).](#)

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## 70A Am. Jur. 2d Social Security and Medicare § 30

American Jurisprudence, Second Edition | May 2021 Update

### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

##### A. Covered Employment


##### 2. Service Outside the United States

##### a. Vessels and Aircraft

## § 30. "On or in connection with" the vessel or aircraft defined

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

An employee performs services on or in connection with the vessel or aircraft if the employee performs services on such vessel or aircraft which are also in connection with the vessel or aircraft. Services performed on the vessel by employees as officers or members of the crew, or as employees of concessionaires, of the vessel, for example, are performed under such circumstances, since such services are also connected with the vessel. Similarly, services performed on the aircraft by employees as officers or members of the crew of the aircraft are performed on and in connection with such aircraft. Services may be performed on the vessel or aircraft, however, which have no connection with it, as in the case of services performed by an employee while on the vessel or aircraft merely as a passenger in the general sense. For example, the services of a buyer in the employ of a department store while a passenger on a vessel are not in connection with the vessel.<sup>1</sup>

The expression "on or in connection with" refers not only to services performed on the vessel or aircraft but also to services connected with the vessel or aircraft which are not actually performed on it. For example, shore services performed as officers or members of the crew, or as employees of concessionaries, of the vessel are services performed in connection with the vessel or aircraft.<sup>2</sup>

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Footnotes

- 1 26 C.F.R. §§ 31.3121(b)-3(c)(2)(ii), 31.3121(b)(4)-1(b).  
2 26 C.F.R. §§ 31.3121(b)-3(c)(2)(iii), 31.3121(b)(4)-1(c).

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## 70A Am. Jur. 2d Social Security and Medicare § 31

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

##### A. Covered Employment


##### 2. Service Outside the United States

##### b. Service for United States Employer

### § 31. Services performed outside the United States by a citizen of the United States as an employee for an American employer

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

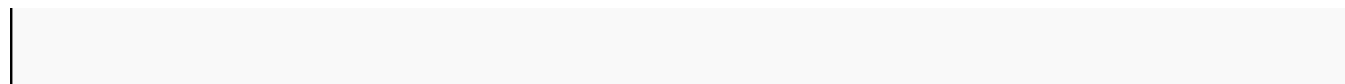
Services performed outside the United States by a citizen or resident of the United States as an employee for an American employer constitute employment provided the services are not specifically excepted.<sup>1</sup>

For remuneration paid before 1984, services performed outside the United States by a resident of the United States (who was not a citizen) as an employee for an American employer did not constitute employment.<sup>2</sup>

Services performed before 1955 outside the United States do not constitute covered employment.<sup>3</sup>

#### Definition:

A "United States citizen" is a person born or naturalized in the United States and subject to its jurisdiction. The United States for this purpose includes all the States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam and American Samoa.<sup>4</sup>



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Footnotes

- 1 [26 U.S.C.A. § 3121\(b\)](#); [26 C.F.R. § 31.3121\(b\)-3\(c\)\(3\)](#).  
For definition of "American employer," see [§ 32](#).
- 2 [26 U.S.C.A. § 3121\(b\)](#), before amendment by [Pub. L. No. 98-21 § 323\(a\)\(2\)](#) (April 23, 1983).
- 3 [26 C.F.R. § 31.3121\(b\)-3\(c\)\(3\)](#).
- 4 [26 U.S.C.A. § 3121\(e\)\(2\)](#); [26 C.F.R. § 31.3121\(e\)-1\(b\)](#).

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## 70A Am. Jur. 2d Social Security and Medicare § 32

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

##### A. Covered Employment


##### 2. Service Outside the United States

##### b. Service for United States Employer

## § 32. American employer defined

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

An American employer includes:

- (1) the United States or any of its instrumentalities;
  - (2) an individual who is a resident of the United States;
  - (3) a partnership in which at least two-thirds of the partners are residents of the United States;
  - (4) a trust, if all the trustees are residents of the United States; and
  - (5) a corporation organized under the laws of the United States or any state.<sup>1</sup>
- A corporation organized under the laws of the United States or any state includes a corporation organized under the laws of the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and American Samoa.<sup>2</sup>

An American employer also includes a State (including the District of Columbia, Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa) or any political subdivision of such state; or an instrumentality of the state or political subdivision.<sup>3</sup>

A claimant's work overseas for foreign affiliates of American firms does not constitute "employment" under the Social Security Act, although the affiliates are wholly-owned subsidiaries of American companies, where there is no evidence warranting piercing the corporate veils of these affiliates and, therefore, the affiliates cannot be deemed American employers. Moreover, a rational basis supports the exclusion from the definition of "employment" of overseas work for foreign affiliates of American companies, in light of the fact that the United States has no power to levy taxes upon foreign subsidiaries of American employers for support of the Social Security system.<sup>4</sup>

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Footnotes

- 1 [26 U.S.C.A. § 3121\(h\); 26 C.F.R. § 31.3121\(h\)-1.](#)
- 2 [26 C.F.R. § 31.3121\(e\)-1.](#)
- 3 [Social Security Handbook § 962 \(last revised March 2001\).](#)
- 4 [Monleone v. Sullivan, 735 F. Supp. 5 \(D.D.C. 1990\).](#)

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 3. Uniformed Services

## § 33. Members of uniformed services

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

"Employment" includes service performed by an individual as a member of a uniformed service on active duty, including active duty for training, but does not include any such service which is performed while on leave without pay.<sup>1</sup> "Employment" also includes service performed by an individual as a member of a uniformed service on inactive duty training.<sup>2</sup>

Services performed as a member of a uniformed service on active duty after 1956 are covered employment. Any person appointed, enlisted or inducted in the Army, Navy, Air Force, Marine Corps, or Coast Guard is a "member of a uniformed service." Thus, is anyone who is serving the Army or Air Force under call or conscription.<sup>3</sup>

This includes individuals who are en route to or from, or at, a place for final acceptance or for entry upon active duty in the military or naval service, if: (1) that person has been provisionally accepted for such service, or (2) the person has been selected for active military or naval service under the Universal Military Training and Service Act. However, this coverage occurs only if the individual has been ordered or directed to proceed to such place.<sup>4</sup>

Certain items are included as the wages of a member of the uniformed services for FICA purposes.<sup>5</sup>

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Footnotes

- 1 26 U.S.C.A. § 3121(m)(1)(A).
- 2 26 U.S.C.A. § 3121(m)(1)(B).
- 3 26 U.S.C.A. § 3121(a), (b), (n).
- 4 26 U.S.C.A. § 3121(h)(5).
- 5 §§ 383, 383.

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 3. Uniformed Services

## § 34. Reserves; National Guard

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed by any person appointed, enlisted or inducted in a Reserve component of a uniformed service (including the Army, Navy, Air Force, Marines or Coast Guard) constitute employment.<sup>1</sup>

So is service as a member of the Fleet Reserve or Fleet Marine Corps Reserve<sup>2</sup> or as commissioned officer of the Reserve Corps of the Public Health Service.<sup>3</sup> Under limited circumstances, services performed by members of the National Guard or Air National Guard of the States or the District of Columbia also constitute employment.<sup>4</sup> However, services performed by a temporary member of the Coast Guard Reserve do not constitute employment.<sup>5</sup>

To make the determination of what is a "reserve component of a uniformed service," the Code uses the definition set forth in Section 102(3) of the Servicemen's and Veteran's Survivor Benefits Act. That Act was repealed and superseded by [Pub. L. No. 85-857](#) (Sept. 2, 1958). Similar provisions as reenacted<sup>6</sup> provide that "reserve component" includes the Army Reserve, the Naval Reserve, the Marine Corps Reserve, the Air Force Reserve, the Coast Guard Reserve, the Army National Guard of the United States, and the Air National Guard of the United States.<sup>7</sup>

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Footnotes

- 1 26 U.S.C.A. § 3121(a), (b), (m), (n).
- 2 26 U.S.C.A. § 3121(n)(2).
- 3 26 U.S.C.A. § 3121(n).
- 4 Social Security Handbook §§ 950 to 952 (last revised June 30, 2004).
- 5 26 U.S.C.A. § 3121(n).
- 6 38 U.S.C.A. § 101.
- 7 38 U.S.C.A. § 101.

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 3. Uniformed Services

## § 35. Reserve Officers' Training Corps (ROTC)

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Members of the Reserve Officers' Training Corps, the Naval Reserve Officers' Training Corps, or the Air Force Reserve Officers' Training Corps, when ordered to annual training duty for 14 days or more, are covered by Social Security. Coverage extends to the time such persons are performing authorized travel to or from that duty.<sup>1</sup>

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### Footnotes

<sup>1</sup> [26 U.S.C.A. § 3121\(n\)\(4\).](#)

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 3. Uniformed Services

## § 36. Cadets and midshipmen

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed by the following individuals are covered by Social Security:

- a cadet at the United States Military Academy
- a midshipman at the United States Naval Academy
- a cadet at the United States Coast Guard Academy
- a cadet at the United States Air Force Academy<sup>1</sup>

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### Footnotes

<sup>1</sup> [26 U.S.C.A. § 3121\(n\)\(3\)](#).



## 70A Am. Jur. 2d Social Security and Medicare § 37

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 3. Uniformed Services

## § 37. Coast and Geodetic Survey

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed by a commissioned officer of the Coast and Geodetic Survey on active duty are covered by Social Security.<sup>1</sup>

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### Footnotes

<sup>1</sup> 26 U.S.C.A. § 3121(a), (b), (m)(1), (n).

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 3. Uniformed Services

## § 38. Public Health Service

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed by a commissioned officer of the Regular Corps of the Public Health Service on active duty are covered by Social Security.<sup>1</sup>

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### Footnotes

<sup>1</sup> [26 U.S.C.A. § 3121\(a\), \(b\), \(n\).](#)

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 3. Uniformed Services

## § 39. Armed Forces retirees

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed on active duty or on activity duty for training by a retired member of the following are covered by Social Security:

- Army
- Army Reserve
- Navy
- Naval Reserve
- Air Force
- Air Force Reserve
- Marines
- Marine Corps Reserve
- Coast Guard

- Coast Guard Reserve
- Army National Guard
- Air National Guard<sup>1</sup>

Retired commissioned officers of the National Oceanic and Atmospheric Administration or of the Regular or Reserve Corps of the Public Health Service are also covered by Social Security.<sup>2</sup>

## CUMULATIVE SUPPLEMENT

### Statutes:

[38 U.S.C.A. § 101\(27\)](#), as amended effective January 1, 2021, adds members of the Space Force Reserve to the list of reserve components of the armed forces.

## [END OF SUPPLEMENT]

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### Footnotes

- <sup>1</sup> [26 U.S.C.A. § 3121\(n\)\(1\)](#); [38 U.S.C.A. § 101\(27\)](#).  
<sup>2</sup> [26 U.S.C.A. § 3121\(n\)](#).

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 4. Hospital Interns

## § 40. Services of a hospital intern

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Work as a hospital—

- performed for a privately owned and operated hospital exempt from income tax<sup>1</sup> as an organization of the type described by statute,<sup>2</sup> is covered employment for social security purposes on the same basis as for other employees of the hospital.
  - where the hospital intern work is performed for a privately owned and operated hospital, not tax-exempt under the statute,<sup>3</sup> coverage under Social Security is compulsory.
  - determinations regarding work of interns and amounts of remuneration constituting covered wages in regard to such work performed for a federal hospital are made by the "head" of the appropriate federal agency or instrumentality.
  - when such work is performed for a state or local government hospital, coverage depends on whether the position is in a group covered under the federal-state agreement.<sup>4</sup>
- A hospital is within the statutory description if it qualifies as a charitable organization.<sup>5</sup> A hospital qualifies as a tax-exempt charitable organization if it provides hospital care that promotes the health of those members of the community who are able to pay for their care and also provides free emergency service.<sup>6</sup>

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Footnotes

- 1 [26 U.S.C.A. § 501\(a\).](#)
- 2 [26 U.S.C.A. § 501\(c\)\(3\).](#)
- 3 [26 U.S.C.A. § 501\(a\).](#)
- 4 Social Security Handbook § 923 (last revised June 30, 2004).
- 5 [26 U.S.C.A. § 501\(c\)\(3\).](#)
- 6 RIA Federal Tax Coordinator 2d, Exempt Organizations, Private Foundations ¶ D-4141.

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 4. Hospital Interns

## § 41. Services of a hospital intern performed before 1966

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed before 1966 as an intern, as distinguished from a resident doctor, in the employ of a hospital are excepted from employment, if the intern has completed a four years' course in a medical school chartered or approved pursuant to state law.<sup>1</sup>

"Intern" refers to a medical student seeking a year of hospital training in order to complete his or her requirements for a medical degree and admission to practice. "Resident" refers to a graduate physician, licensed to practice medicine, who serves on the staff of a hospital. The resident might be seeking further training for use ultimately in private practice, or might be a regular staff physician.<sup>2</sup>

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### Footnotes

<sup>1</sup> 26 C.F.R. § 31.3121(b)(13)-1(b).

<sup>2</sup> *St. Luke's Hospital Ass'n of Cleveland, Ohio, of Methodist Church v. U. S.*, 333 F.2d 157, 1 Ohio Misc. 89, 28 Ohio Op. 2d 305 (6th Cir. 1964).

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 5. Aliens

## § 42. Services performed by nonresident aliens temporarily present in United States

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed after 1961 by a nonresident alien individual who is temporarily present in the United States as a nonimmigrant under §§ 101(a)(15)(F), (J), (M), (Q) of the Immigration and Nationality Act<sup>1</sup> do not constitute employment if the services are performed to carry out a purpose for which the individual was admitted.<sup>2</sup>

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### Footnotes

<sup>1</sup> 8 U.S.C.A. § 1101(a)(15)(F), (J), (M), (Q), as amended.

<sup>2</sup> 26 U.S.C.A. § 3121(b)(19); 42 U.S.C.A. § 410(a)(19).

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## 70A Am. Jur. 2d Social Security and Medicare § 43

American Jurisprudence, Second Edition | May 2021 Update

### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 5. Aliens

## § 43. Nonimmigrant alien temporarily in United States

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

### Definition:

Generally, a "nonimmigrant alien" is an alien having a residence in a foreign country that the alien has no intention of abandoning, who comes temporarily to the United States for such reasons as those listed below, among others.<sup>1</sup>

Nonimmigrant aliens excluded from coverage of social security include an alien having a residence in a foreign country that the alien has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by the alien and approved by the Attorney General after consultation with the U.S. Office of Education. The institution or place of study must have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student. Nonimmigrant aliens also include the alien spouse and minor children of any such alien if accompanying the alien or following to join him or her.<sup>2</sup>

Also excluded from coverage of social security are aliens having a residence in a foreign country who have no intention of abandoning that country and who are bona fide students, scholars, trainees, teachers, professors, research assistants, specialists, or leaders in a field of specialized knowledge or skill, or other persons of similar description, who are coming temporarily to the United States as participants in programs designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if coming to the United States to participate in programs under which they will receive graduate medical education or training, also meet special requirements. Nonimmigrant aliens also include the alien spouse and minor children of any such alien if accompanying the alien or following to join him or her.<sup>3</sup>

Also excluded from coverage of social security is:

- (1) an alien having a residence in a foreign country which the alien has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States particularly designated by him or her and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant nonacademic student and if any such institution fails to make reports promptly the approval shall be withdrawn;
- (2) the alien spouse and minor children of any alien described above if accompanying or following to join such an alien; and
- (3) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described above except that the alien's course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico.<sup>4</sup>

Also excluded from coverage of social security is an alien having a residence in a foreign country which the alien has no intention of abandoning who is coming temporarily (for a period not to exceed 15 months) to the United States as a participant in an international cultural exchange program approved by the Secretary of Homeland Security for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers.<sup>5</sup>

An alien individual who is temporarily present in the United States as a nonimmigrant alien as defined above is deemed to be a nonresident alien individual. An alien individual admitted to the United States as an exchange visitor under the Mutual Educational and Cultural Exchange Act,<sup>6</sup> is considered a nonimmigrant alien.<sup>7</sup>

If services are performed by a nonimmigrant alien's spouse or minor child, who is also an alien, the services are not excepted from employment unless the spouse or minor child also is considered a nonimmigrant alien.<sup>8</sup>

Work performed by foreign nonimmigrants temporarily admitted to the United States under the nonimmigrant categories of the Immigration and Nationality Act described above<sup>9</sup> is not covered by Social Security if the work is performed to carry out the purposes for which the foreign nonimmigrants were admitted to the United States, or special permission to work has been granted by the Department of Homeland Security (in the case of a student) or by the sponsor of an exchange visitor.<sup>10</sup>

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#### Footnotes

- 1 8 U.S.C.A. § 1101(a)(15)(F), (J), (M), (Q).
- 2 8 U.S.C.A. § 1101(a)(15)(F).
- 3 8 U.S.C.A. § 1101(a)(15)(J).

4 8 U.S.C.A. § 1101(a)(15)(M).

5 8 U.S.C.A. § 1101(a)(15)(Q).

6 22 U.S.C.A. §§ 2451 to 2464.

7 26 C.F.R. § 31.3121(b)(19)-1(a)(1).

8 26 C.F.R. § 31.3121(b)(19)-1(a)(2).

9 8 U.S.C.A. § 1101(a)(15)(F), (J), (M), (Q).

10 Social Security Handbook § 939.1 (last revised Jan. 25, 2007).

Work by a student or exchange visitor other than that performed to carry out the purpose for which he or she was admitted is not excluded from social security coverage. However, if the foreign nonimmigrant has received special permission to work, then his or her services may be excluded from coverage. Social Security Handbook § 939.1.

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## 70A Am. Jur. 2d Social Security and Medicare § 44

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 5. Aliens

### § 44. Services performed by a nonresident alien to carry out the purpose for which admitted

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed by a nonresident alien student temporarily in the United States as a nonimmigrant<sup>1</sup> are not covered under the Social Security program if the services are performed to carry out the purpose for which the alien was admitted, and thus there is no withholding of social security or Medicare taxes from pay for such services. However, the Internal Revenue Service (IRS) views these services as very limited, generally including only on-campus work, practical training, and economic hardship employment. Thus, a nonresident alien admitted to the United States as a student is generally not permitted to work for a wage or salary or to engage in business while in the United States, but where such permission is properly granted, social security and Medicare taxes are not withheld from pay unless the student is considered a resident alien. Also, where on-campus work is permitted, or employment due to severe economic necessity or optional practical training is granted, social security and Medicare taxes are also not withheld from pay.<sup>2</sup>

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#### Footnotes

<sup>1</sup> 8 U.S.C.A. § 1101(a)(15)(F), (J), (M), (Q).

<sup>2</sup> I.R.S. Pub. 519, U.S. Tax Guide for Aliens, 2010 WL 6064593.

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## 70A Am. Jur. 2d Social Security and Medicare § 45

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 5. Aliens

## § 45. Effect of tax treaty on services performed by nonresident aliens

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

A treaty between the United States and a foreign country may either supersede the United States rules relating to FICA taxes or may provide that they yield to U.S. law on this issue.<sup>1</sup>

Where the exemption from taxes in a tax treaty referred only to federal income tax and excess profits tax, the provisions of the treaty did not affect the FICA tax. Accordingly, it was held that the remuneration received by the foreign individual in the United States was exempt from income tax under the treaty but not FICA tax.<sup>2</sup>

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### Footnotes

<sup>1</sup> RIA Federal Tax Coordinator 2d, Tax Treaties ¶¶ O-15000 to O-15034.

<sup>2</sup> [Rev. Rul. 56-609, 1956-2 C.B. 1066.](#)

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 5. Aliens

## § 46. Services performed by a resident of the Republic of the Philippines while temporarily in Guam

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed by a resident of the Republic of the Philippines while in Guam on a temporary basis as a nonimmigrant alien admitted to Guam are excepted from employment.<sup>1</sup>

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### Footnotes

<sup>1</sup> [26 U.S.C.A. § 3121\(b\)\(18\)](#); [42 U.S.C.A. § 410\(a\)\(18\)](#).

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## 70A Am. Jur. 2d Social Security and Medicare § 47

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 6. International Organizations and Foreign Governments

## § 47. Services in the employ of an international organization

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed in the employ of an international organization are usually excepted from employment.<sup>1</sup> An exception is service constituting employment.<sup>2</sup>

### Definition:

"International organization" means a public international organization entitled to enjoy the privilege, exemptions, and immunities as an international organization under the International Organization Immunities Act.<sup>3</sup>

For the service to be exempt the international organization must be one in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing the participation or making an appropriation for the participation, and which has been designated by the President, through an Executive order, as entitled to enjoy the privileges, exemptions and

immunities. The President can make a judgment as to whether to limit or revoke the enjoyment by the organization or its officers or employees, of the privileges, exemptions or immunities.<sup>4</sup> Federal employees transferred to the service of an international organization are included in this exception.<sup>5</sup>

**Observation:**

Income tax reimbursements (including self-employment tax reimbursements) to a United States citizen by an international organization in the years following termination of employment in the United States are subject to self-employment taxes in the year of receipt. The reimbursements are subject to the taxes whether or not the individual continues to live in the United States, because the employment was in the United States.<sup>6</sup>

**Practice Tip:**

A Canadian citizen, who lived in the United States since 1944, was employed in the United States by the French Government. In 1967, she waived her rights under the Immigration and Nationality Act, and thereby acquired permanent resident status in the United States. From 1968 to 1972, she paid self-employment tax for social security benefits. She was denied benefits, based on a determination that she was not entitled to benefits as an alien and that her income was not self-employment income. This denial of benefits was held constitutional, since aliens employed by foreign governments and international organizations enjoy many privileges and immunities, not enjoyed by U.S. citizens and other aliens, which are forfeited only when waived under the Immigration and Nationality Act. If such alien employees were eligible for social security benefits, they could retain their privileges for years and then change their status at "the last moment" through a waiver to qualify for the benefits.<sup>7</sup>

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**Footnotes**

- 1 26 U.S.C.A. § 3121(b)(15); 42 U.S.C.A. § 410(a)(15).
- 2 26 U.S.C.A. § 3121(y); 42 U.S.C.A. § 410(r).  
See also Social Security Independence and Program Improvements Act of 1994 (Pub. L. No. 103-296 § 319(a)(5), (b)(3)) (applicable by § 319(c) to service performed after the calendar quarter following enactment).
- 3 26 U.S.C.A. § 7701(a)(18), referring to 22 U.S.C.A. §§ 288 to 288f.
- 4 22 U.S.C.A. § 288.
- 5 26 U.S.C.A. § 3121(y).
- 6 Rev. Rul. 84-122, 1984-33 I.R.B. 6.
- 7 Letourneau v. Califano, 453 F. Supp. 636 (S.D. N.Y. 1978).



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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 6. International Organizations and Foreign Governments

## § 48. Service in the employ of a foreign government

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed by an employee in the employ of a foreign government are excluded from employment. This excludes not only services performed by ambassadors, ministers, and other diplomatic officers and employees but also services performed as a consular or other officer or employee of a foreign government, and as a nondiplomatic representative of a foreign government.<sup>1</sup> The citizenship or residence of the employee is immaterial. Also, it does not matter whether the foreign government grants an equivalent exemption for similar services performed in the foreign country by United States citizens.<sup>2</sup>

### Observation:

Services performed for a foreign government are excluded from "employment" even though the services are performed in the United States. However, U.S. citizens working within the United States as employees of foreign governments are treated as having earnings from self-employment.<sup>3</sup>

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Footnotes

- 1                    26 U.S.C.A. § 3121(b)(11); 26 C.F.R. § 31.3121(b)(11)-1(a).
- 2                    26 C.F.R. § 31.3121(b)(11)-1(b).
- 3                    Social Security Law and Practice §§ 71:1 to 71:24.

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

##### A. Covered Employment

##### 6. International Organizations and Foreign Governments

### § 49. Services performed in the employ of a wholly-owned instrumentality of a foreign government

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed by an employee in the employ of instrumentalities of a foreign government are excepted from employment. The exception includes all services performed in the employ of an instrumentality of the government of a foreign country, if:

- (1) the instrumentality is wholly owned by the foreign government;
- (2) the services are of a character similar to those performed in foreign countries by employees of the U.S. government or of an instrumentality of the U.S. government; and
- (3) the Secretary of State certifies to the Secretary of the Treasury that the foreign government whose instrumentality and its employees claim exemption, grants an equivalent exemption for services performed in the foreign country by employees of the U.S. government and its instrumentalities.<sup>1</sup>

For purposes of this exception, the employee's citizenship or residence is immaterial.<sup>2</sup>

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#### Footnotes

- 1 26 U.S.C.A. § 3121(b)(12); 26 C.F.R. § 31.3121(b)(12)-1(a), 26 C.F.R. § 31.3121(b)(1)-1.  
2 26 C.F.R. § 31.3121(b)(12)-1(b).

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## 70A Am. Jur. 2d Social Security and Medicare § 50

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 7. Other Services Excepted from Employment

## § 50. Services performed by foreign agricultural workers

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

### A.L.R. Library

[What constitutes "agricultural" or "farm" labor within social-security or unemployment-compensation acts, 60 A.L.R.5th 459](#)

Services performed by a foreign agricultural worker lawfully admitted to the United States from the Bahamas, Jamaica, and the British West Indies, or from any foreign country or possession thereof, on a temporary basis to perform agricultural labor are excepted from employment.<sup>1</sup> For example, Special Agricultural Workers (SAWs) employed by a Chapter 11 debtor to harvest seasonal crops, who had validly applied for the SAW program and were working under interim work authorizations while awaiting determinations as to adjustment of their alien residency status, were excluded from "employment" and, thus, were exempt from FICA.<sup>2</sup>

The service of alien agricultural workers who illegally enter the United States and are employed by farmers in the United States are not excepted from employment.<sup>3</sup> For example, alien farm workers serving as temporary agricultural laborers in the United States who were not admitted under the provisions of the Immigration and Nationality Act<sup>4</sup> are not exempt from paying FICA

taxes.<sup>5</sup> Similarly, the exemption to FICA coverage for foreign agricultural workers has been held only to apply to those workers who were admitted to the United States pursuant to the H-2A or H-2 program.<sup>6</sup>

Services performed by Mexican agricultural workers under contracts entered into accordance with title V of the Agricultural Act of 1949, as amended, are excepted from employment.<sup>7</sup> Such contracts could be entered into only for services performed before 1965. They could provide for the performance only of services which constitute "agricultural employment," a term which includes services not constituting "agricultural labor."<sup>8</sup> For purposes of title V of the Agricultural Act of 1949, as amended, "agricultural employment" includes services or activities included under § 3(f) of the Fair Labor Standards Act of 1938, as amended, or [26 U.S.C.A. § 3121\(g\)](#). Under § 507 of the Agricultural Act of 1949, as amended, and as in effect before October 3, 1961, "agricultural employment" included also horticultural employment, cotton ginning, compressing and storing, crushing of oil seeds, and the packing, canning, freezing, drying, or other processing of perishable or seasonable agricultural products.<sup>9</sup>

Services performed after 1956 by a foreign agricultural worker legally admitted to the United States from any foreign country or possession of such country, including Mexico, are excepted from employment.<sup>10</sup>

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#### Footnotes

- 1 [26 U.S.C.A. § 3121\(b\)\(1\)](#); [42 U.S.C.A. § 410\(a\)\(1\)](#).
- 2 [In re Sun World Intern., Inc.](#), 217 B.R. 281 (C.D. Cal. 1998).
- 3 [Rev. Rul. 77-140](#), 1977-1 C.B. 301.
- 4 [8 U.S.C.A. §§ 1101 to 1537](#).
- 5 [Moorhead v. U.S.](#), 774 F.2d 936 (9th Cir. 1985) adopted as Soc. Sec. Rul. 86-11c, [1986 WL 68670](#) (S.S.A.) (July 1, 1986).
- 6 [Calderon v. Witvoet](#), 764 F. Supp. 536 (C.D. Ill. 1991), judgment aff'd in part, vacated in part on other grounds, 999 F.2d 1101, 26 Fed. R. Serv. 3d 1494, 123 A.L.R. Fed. 697 (7th Cir. 1993).
- 7 Former [26 U.S.C.A. § 3121\(b\)\(1\)\(A\)](#).
- 8 Defined in [26 U.S.C.A. § 3121\(g\)](#).
- 9 [26 C.F.R. § 31.3121\(b\)\(1\)-1\(a\)](#).
- 10 [26 C.F.R. § 31.3121\(b\)\(1\)-1\(c\)](#).

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## 70A Am. Jur. 2d Social Security and Medicare § 51

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 7. Other Services Excepted from Employment

## § 51. Domestic service performed by students for college clubs and organizations

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services of a household nature performed in or about the club rooms or house of a local college club, or in or about the club rooms or house of a local chapter of a college fraternity or sorority, by a student who is enrolled and regularly attending classes at a school, college, or university are excepted from employment.<sup>1</sup>

For purposes of this exemption, the tests are the type of services performed by the employee, the character of the place where the services are performed, and the status of the employee as a student enrolled and regularly attending classes at a school, college, or university.<sup>2</sup>

In general, services of a household nature in or about the club rooms or house of a local college club or local chapter of a college fraternity or sorority include services rendered by cooks, waiters, butlers, maids, janitors, laundresses, furnacemen, handymen, gardeners, housekeepers, and housemothers.<sup>3</sup>

### Definition:

A "local college club" is made up of members who are mainly students enrolled in the college, or people directly connected with the college. The membership of a local chapter of a college fraternity or sorority must be composed mostly of students enrolled



in the college. However, the fact that a local college club or local chapter of a college fraternity or sorority has some alumni or faculty members is immaterial.<sup>4</sup>

A local college club or local chapter of a college fraternity or sorority does not include an alumni club or chapter. If the club rooms or house of a local college club or local chapter of a college fraternity or sorority is used primarily for the purpose of supplying board or lodging to students or the public as a business enterprise, the services performed therein are not excluded from employment.<sup>5</sup>

The term "school, college, or university" is to be taken in its commonly or generally accepted sense.<sup>6</sup>

Services of a household nature are not excluded from employment if performed in or about rooming or lodging houses, boarding houses, clubs, except local college clubs, hotels, hospitals, eleemosynary institutions, or commercial offices or establishments.<sup>7</sup>

**Practice Tip:**

Students enrolled at a university and who regularly attend classes there perform domestic services for a women's club of the university. The students are paid a weekly fee for their services. The club is organized and operated for social purposes. Active membership is open to women at the university who are members of the faculty or the administrative staff and adult women of the families of active and former members. Persons can retain their membership after they have severed their ties with the university. Female graduate students, chaperons of sororities, women staff members of organizations associated with the university, and adult women residing in the community but not associated with the university, can be associate members. The club is not a student organization but is composed of persons whose only connection with the university is through a family relationship, including families of persons performing services for organizations only remotely connected with the university. Some of the persons qualify for membership just because they reside in the community. The club is not a local college club. The domestic services performed by the students for the club are not excepted from employment.<sup>8</sup>

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**Footnotes**

- 1 26 U.S.C.A. § 3121(b)(2); 42 U.S.C.A. § 410(2); 26 C.F.R. § 31.3121(b)(2)-1(a).
- 2 26 C.F.R. § 31.3121(b)(2)-1(a).
- 3 26 C.F.R. § 31.3121(b)(2)-1(b), 20 C.F.R. § 404.1014(b)(1).
- 4 Social Security Handbook § 920.1 (last revised July 7, 2004).
- 5 26 C.F.R. § 31.3121(b)(2)-1(c), 20 C.F.R. § 404.1014(b)(2).
- 6 26 C.F.R. § 31.3121(b)(2)-1(d).

7 [26 C.F.R. § 31.3121\(b\)\(2\)-1\(e\).](#)

For discussion of domestic service in a private home of the employer, see §§ [396](#), [386](#) to [388](#).

8 [Rev. Rul. 72-174, 1972-1 C.B. 315.](#)

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## 70A Am. Jur. 2d Social Security and Medicare § 52

American Jurisprudence, Second Edition | May 2021 Update

### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 7. Other Services Excepted from Employment

## § 52. Services performed by enrolled students for a school, college or university

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed in the employ of a school, college, or university, whether or not such organization is exempt from income tax, are excepted from employment, if the services are performed by a student who is enrolled and is regularly attending classes at that school, college, or university.<sup>1</sup>

Services performed in the employ of an organization which is a nonprofit organization auxiliary to a school, college or university, as described by statute,<sup>2</sup> are excepted from employment if these conditions exist: (1) the organization is organized, and at all times thereafter operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university and operated, supervised, or controlled by or in connection with the school, college, or university; or (2) the services are performed by a student who is enrolled and is regularly attending classes at that school, college, or university.

This does not apply to services performed in the employ of a school, college, or university of a state or a political subdivision of a state by a student referred to in § 418(c)(5) of the Social Security Act<sup>3</sup> if such services are covered under the agreement between the Commissioner of Social Security and such state entered into under § 418 of that Act.<sup>4</sup>

The amount of remuneration for services performed by the employee in the calendar quarter, the type of services performed by the employee, and the place where the services are performed are immaterial. The statutory tests are (1) the character of the organization in the employ of which the services are performed as a school, college, or university, or certain other specified

organizations, and (2) the status of the employee as a student enrolled and regularly attending classes at the school, college, or university by which the employee is employed or with which the employer is affiliated.<sup>5</sup>

The status of the employee as a student performing the services is determined on the basis of the relationship of the employee with the organization for which the services are performed. An employee who performs services in the employ of a school, college, or university, as an incident to and for the purpose of pursuing a course of study at the school, college, or university has the status of a student in the performance of such services. An employee who performs services in the employ of nonprofit auxiliary organization, as an incident to and for the purpose of pursuing a course of study at a school, college, or university with which such organization is affiliated, has the status of a student in the performance of those services.<sup>6</sup>

An organization is a school, college, or university if its primary function is the presentation of formal instruction, it normally maintains a regular faculty and curriculum, and it normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on.<sup>7</sup>

The services that constitute employment include—

- students who worked for a manufacturing corporation that leased a building from a college and agreed that only the college's students were to be employed as production workers for the corporation were employees of the manufacturing corporation, even though selections and withdrawals of student workers were made by the college. Training for the jobs was given by the corporation, and the corporation controlled the quality and manner of performance of the work. In addition, all equipment and materials used were furnished by the corporation.<sup>8</sup>
- a student was enrolled and regularly attended classes at the university. During that period he was also employed by the university. His work for the university was not limited to the academic year, but continued through the summer vacation when he did not attend classes. Since the student was not enrolled or attending classes during the summer vacation, the services he performed for the university during that period are included in employment.<sup>9</sup>
- certain graduate students and research assistants who work for the university use the summer months to conduct research related to Ph.D. dissertations or for independent study and research related to preliminary examinations. The students do not register for courses or attend classes but are considered by the university to be engaged full time in the study and research which is an integral part of their degree programs. Although the students are considered by the university to be engaged full time in independent study and research during the summer, they are not enrolled and regularly attending classes during this period. Thus, their services are included in employment.<sup>10</sup>
- services performed by participants enrolled in a college's Job Training Partnership Act/Summer Youth Employment and Training Program are not excepted from employment under 26 U.S.C.A. § 3121(b)(10)(A), and thus remuneration paid by the college to each participant is FICA wages, where the participants only attend class for one to two hours a day. The participants are thus not taking a substantial course load and their services are not incident to or for the purposes of pursuing a course of study.<sup>11</sup>

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#### Footnotes

- 1 26 U.S.C.A. § 3121(b)(10)(A); 42 U.S.C.A. § 410(a)(10)(B).
- 2 26 U.S.C.A. § 509(a)(3) and 26 C.F.R. § 1.509(a)-4.
- 3 42 U.S.C.A. § 418(c)(5).
- 4 26 U.S.C.A. § 3121(b)(10)(B); 42 U.S.C.A. § 410(a)(10)(B).
- 5 26 C.F.R. § 31.3121(a)(10)-2(b).

- 6                    26 C.F.R. § 31.3121(b)(10)-2(c).  
7                    26 C.F.R. § 31.3121(b)(10)-2(c).  
                      For domestic service performed by a student in a local college club, or local chapter of a college fraternity  
                      or sorority, see § 51.  
8                    Rev. Rul. 55-500, 1955-2 C.B. 398.  
9                    Rev. Rul. 72-142, 1972-1 C.B. 317.  
10                  Rev. Rul. 74-109, 1974-1 C.B. 288.  
11                  Priv. Ltr. Rul. 8720038, 1987 WL 847231 (IRS PLR) (Feb. 13, 1987).
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## 70A Am. Jur. 2d Social Security and Medicare § 53

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

##### A. Covered Employment

##### 7. Other Services Excepted from Employment

### § 53. Services in delivery or distribution of newspapers or shopping news by individuals under age 18

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed by an employee under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution, as for example, by a regional distributor, are excepted from employment.<sup>1</sup>

Thus, the services performed by an employee under the age of 18 in making house-to-house delivery or sale of newspapers or shopping news, including handbills and other similar types of advertising material, are excepted from employment. The services are excepted regardless of the form or method of compensation. Incidental services by the employee who makes the house-to-house delivery, such as services in assembling newspapers, are excepted. The exception continues only during the time that the employee is under the age of 18.<sup>2</sup>

"Newspapers or shopping news" also includes shopping guides, handbills, and other types of advertising material.<sup>3</sup> Delivery or distribution means retail sale, house-to-house delivery, or the passing of handbills on the street.<sup>4</sup> This exception does not apply to the delivery or distribution of magazines.<sup>5</sup>

Samples of merchandise, although distributed solely for advertising purposes, do not come within the category of newspapers, handbills, or shopping news. Such samples, even though they may be wrapped or otherwise contained in boxes or bags, or attached to printed cards bearing advertising matter, do not have the characteristics of shopping news such as is found

in newspapers, handbills and similar advertising literature. Therefore, samples of merchandise, such as cereals, bread, soap, breakfast food, etc., distributed for advertising purposes do not come within the category of newspapers, handbills, shopping news, and similar advertising materials. Services performed by carrier boys under the age of 18 in the house-to-house distribution of such articles for their employers are not excepted from "employment."<sup>6</sup>

Where an employer engages carrier boys under the age of 18 to perform delivery services during a payroll period which are excluded from the statutory definition of "employment,"<sup>7</sup> and these carrier boys perform delivery services for that employer during the same payroll period which are not so excluded, the included-excluded service rule<sup>8</sup> is applied in determining whether any liability for federal employment taxes is incurred with respect to the remuneration for the services performed by the carriers.<sup>9</sup>

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#### Footnotes

- 1 [26 U.S.C.A. § 3121\(b\)\(14\)\(A\); 42 U.S.C.A. § 410\(a\)\(14\)\(A\).](#)
- 2 [26 C.F.R. § 31.3121\(b\)\(14\)-1\(a\).](#)
- 3 [Social Security Handbook § 929.1 \(last revised June 30, 2004\).](#)
- 4 [Social Security Handbook § 929.2 \(last revised June 30, 2004\).](#)
- 5 [Social Security Handbook § 929.3 \(last revised June 30, 2004\).](#)
- 6 [Rev. Rul. 56-478, 1956-2 C.B. 684.](#)
- 7 [26 U.S.C.A. § 3121\(b\)\(14\)\(A\).](#)
- 8 [§ 59.](#)
- 9 [Rev. Rul. 56-478, 1956-2 C.B. 684.](#)

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## 70A Am. Jur. 2d Social Security and Medicare § 54

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 7. Other Services Excepted from Employment

## § 54. Services in the sale of newspapers or magazines to consumers

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed by an employee in, and at the time of, the sale of newspapers or magazines to ultimate consumers are excepted from employment if the newspapers or magazines are to be sold by the employee at a fixed price, compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to the employee. The services are excepted whether or not the employee is guaranteed a minimum amount of compensation for the service, or is entitled to be credited with the unsold newspapers or magazines turned back.<sup>1</sup>

The services are excepted without regard to the age of the employee. Services performed other than at the time of sale to the ultimate consumer are not excepted. Thus, the services of a regional distributor which preceded but are not immediately part of the sale to the ultimate consumer are not excepted. However, incidental services by the employee who makes the sale to the ultimate consumer, such as services in assembling newspapers or in taking newspapers or magazines to the place of sale are services excepted from employment.<sup>2</sup>

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### Footnotes

<sup>1</sup> 26 U.S.C.A. § 3121(b)(14)(B); 42 U.S.C.A. § 401(a)(14)(B).

<sup>2</sup> 26 C.F.R. § 31.3121(b)(14)-1(b), 20 C.F.R. § 404.1030(b).



As to coverage of these services as self-employment, see §§ [532](#) to [535](#).

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## 70A Am. Jur. 2d Social Security and Medicare § 55

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 7. Other Services Excepted from Employment

## § 55. Services performed under a share-farming agreement

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

### A.L.R. Library

[What constitutes "agricultural" or "farm" labor within social-security or unemployment-compensation acts, 60 A.L.R.5th 459](#)

Employment does not include services performed by an individual under an arrangement with the owner or tenant of land where:

- (1) the individual undertakes to produce agricultural or horticultural commodities (including livestock, bees, poultry, and fur-bearing animals and wildlife) on the land;
  - (2) the agricultural or horticultural commodities produced by the individual, or the proceeds therefrom, are to be divided between the individual and the owner or tenant; and
  - (3) the amount of the individual's share depends on the amount of the agricultural or horticultural commodities produced.<sup>1</sup>
- If any one of these elements is missing, the exception does not apply.<sup>2</sup>

**Definition:**

A "share-farming arrangement" is one in which the share-farmer performs the labor for production of the crop. It is not one in which the landowner agrees to participate in the day-to-day physical labor in the production of the crop or livestock.<sup>3</sup>

The landowner may sometimes harvest or sell the crop produced. If the person who produced a crop has the responsibility for planting, raising, and caring for the crop or livestock during substantially all of the growing period, the element of a share-farming arrangement is still met.<sup>4</sup>

This does not apply, moreover, if the individual who undertakes to produce the crop does not receive a proportionate share of the crop or livestock, or proceeds from the sale of the crop or livestock.<sup>5</sup>

If the arrangement between the parties provides that the individual is to be compensated at a specified rate of pay or is to receive a fixed sum of money or a stipulated quantity of the commodities to be produced, without regard to the amount actually produced, the production of such crop or livestock is not excepted from employment.<sup>6</sup>

"Undertakes to produce a crop or livestock" means performing or assuming the responsibility for performing substantially all the physical labor incident to the production of the farm product.<sup>7</sup> Generally, this means that the tenant has the responsibility for caring for the crop from the beginning up to and including harvesting. In some circumstances, it may not include planting of the crop. For example, in fruit raising operations, the planting of fruit trees, bushes, or plants may have been done by the landowner in a prior year. This would not alter the relationship of the parties to a share-farming arrangement with regard to the fruit crop.<sup>8</sup>

"Producing a crop or livestock" does not include such specialized activities as custom sheep shearing, custom harvesting, dusting, or custom cultivating.<sup>9</sup>

Situations in which individuals do not perform services under a share-farming arrangement include:

- (1) a married couple who harvested pickling cucumbers at a farm and were paid one-half of the value of the cucumbers that they harvested were not share farmers within the meaning of [26 U.S.C.A. § 3121\(b\)\(16\)](#), because merely picking a crop in exchange for a portion of the proceeds cannot be included within the phrase "undertakes to produce" as provided in [26 U.S.C.A. § 3121\(b\)\(16\)\(A\)](#). Consequently, the farm owners who employed the couple were required by the Federal Insurance Contributions Act<sup>10</sup> to deduct and pay the appropriate FICA taxes.<sup>11</sup>
- (2) a producer of crude gum turpentine leases timberland from large land owners in exchange for a percentage of the gum sales. Employees of the company "streak" pine trees in order to induce the flow of crude gum resin into cups for gathering. Each employee works a certain number of trees, for the season. The cups are emptied by other employees of the company. The employees are paid in dollars for each barrel of crude gum resin produced by them, which is generally equal to about 40 percent of the net selling price after expenses. In some cases the company may also pay a bonus for high production. The employees are paid at a specified rate per barrel of resin produced as a result of their work. They do not undertake to produce the commodity, but instead perform only one function in its production, namely streaking the trees. The employees

who streak the trees are not performing services under a share-farming arrangement and their services are not excepted from employment.<sup>12</sup>

- (3) farm owners employed migrant farm workers to assist them in the cultivation and harvesting of cucumber crops. A portion of the cucumber fields was assigned to each family unit of the migrant workers. The family unit had the responsibility to care for their assigned block and after harvesting the cucumbers, they were paid an amount equal to half of the receipts from the sale of the cucumbers. The cucumbers were already planted before the families were hired. The farm owner supplied the insecticides and fertilizers and all the necessary farming implements except hoes. The farm owner would also advise on the proper methods of cultivating and harvesting. The requirement that the individual "undertake to produce" includes such relevant factors as whether the worker has responsibility for a wide range of farming activities and whether the worker incurred out-of-pocket business-related expenses typical in true share-farming arrangements. A worker has responsibility for an activity only if the worker participates in the decision-making process, such as with regard to the types of crops to be grown and the location of areas to be planted.<sup>13</sup>

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#### Footnotes

- 1 [26 U.S.C.A. § 3121\(b\)\(16\); 42 U.S.C.A. § 401\(a\)\(16\).](#)
- 2 [Social Security Handbook § 1119.1 \(last revised March 2001\).](#)
- 3 [Social Security Handbook § 1120.1 \(last revised March 2001\).](#)
- 4 [Social Security Handbook § 1120.4 \(last revised March 2001\).](#)
- 5 [26 C.F.R. § 31.3121\(b\)\(16\)-1\(b\).](#)
- 6 [26 C.F.R. § 31.3121\(b\)\(16\)-1\(b\).](#)
- 7 [Social Security Handbook § 1120.2 \(last revised March 2001\).](#)
- 8 [Social Security Handbook § 1120.3 \(last revised March 2001\).](#)
- 9 [Social Security Handbook § 1120.5 \(last revised March 2001\).](#)
- 10 [26 U.S.C.A. §§ 3101 to 3128.](#)
- 11 [Sanchez v. Overmyer, 845 F. Supp. 1178 \(N.D. Ohio 1993\).](#)
- 12 [Rev. Rul. 75-474, 1975-2 C.B. 400.](#)
- 13 [Rev. Rul. 85-85, 1985-25 I.R.B. 9, not following the decision in \[Sachs v. U.S.\]\(#\), 422 F. Supp. 1092 \(N.D. Ohio 1976\).](#)  
For services performed under a share-farming agreement as self-employment, see §§ [550](#) to [561](#).

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## 70A Am. Jur. 2d Social Security and Medicare § 56

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 7. Other Services Excepted from Employment

## § 56. Services performed on a boat engaged in catching fish, etc

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life are excepted from employment if:

- (1) the individual receives a share of the boat's (or boats' in the case of a fishing operation involving more than one boat) catch of fish or a share of the proceeds from the sale of the catch;
- (2) the amount of the individual's share depends solely on amount of the boat's (or boats' for a fishing operation involving more than one boat) catch of fish;
- (3) the individual does not receive and is not entitled to receive, any cash remuneration, other than remuneration from the sale of the catch; and
- (4) the crew of the boat, or of each boat from which the individual receives a share of the catch, normally is made up of fewer than 10 individuals.<sup>1</sup>

The individual's share does not depend solely on the boat's catch of fish, if there exists an agreement with the boat's owner or operator by which the individual's remuneration is determined partially or fully by a factor not dependent on the size of the catch. For example, if a boat is operated under a remuneration arrangement, *e.g.*, a collective agreement which specifies that crew members, in addition to receiving a share of the catch, are entitled to an hourly wage for repairing nets, regardless of whether

this wage is actually paid, then all the crew members covered by the arrangement are entitled to receive cash remuneration other than a share of the catch and their services are not excepted from employment.<sup>2</sup>

The operating crew of a boat includes all persons on the boat, including the captain, who receive any form of remuneration in exchange for services rendered while on a boat engaged in catching fish.<sup>3</sup>

During the same year, services performed by a crew member may be excepted from employment for one voyage and not excepted on a subsequent voyage on the same or on a different boat.<sup>4</sup>

During the same voyage, service performed by one crew member may be excepted from employment but service performed by another crew member may not be so excepted.<sup>5</sup>

The payment of pers (small amounts of money paid to particular crew members in recognition of services performed at sea in addition to their normal duties) to the cook, mate and engineer on commercial fishing vessels was not based on the size of a particular catch, despite the fact that a collective bargaining agreement required that pers be allocated according to a sliding scale or schedule based on a percentage of the proceeds from the catch, so that the recipients did not qualify for the statutory exemption from employment taxes,<sup>6</sup> because the schedule contained in the bargaining agreement was not designed to calculate the per based on the size of a particular catch; evidence showed that a number of pers were paid without employing the sliding scale and without purporting to be based on the size of a particular catch; and flat per amounts were depicted in representative settlement sheets for some vessel owners.<sup>7</sup>

**Observation:**

The owner of a fishing boat employs a captain and eight other crew members to perform services on the boat. The remuneration paid to each of the individuals will be computed as follows: (1) out of the gross proceeds from the sale of the catch deductions are made for certain specified expenses and a payment of \$25 each to the mate, engineer, and cook; (2) 60% of the remaining proceeds is divided equally among the captain and other crew members, and the remaining 40% is divided between the captain and the owner. Before each voyage, the crew members are responsible for loading supplies and doing other necessary work in port in preparation for the voyage. At the completion of the voyage, the crew must remove and transport the catch to the point of sale and perform other incidental duties necessary to leave the boat in the same condition as it was before the voyage. These duties, which may include repairing nets, constructing new nets, and splicing cable, are performed without additional remuneration. Since the mate, engineer, and cook receive a payment of \$25 that does not depend upon the amount of the boat's catch of fish, their services are not excepted from employment. However, services performed by the other six crew members are excepted from employment because they do not receive any cash remuneration other than a share of the proceeds from the sale of the catch, their share depends on the amount of the catch, and the operating crew of the boat normally consists of fewer than 10 individuals.<sup>8</sup>

Footnotes

1 26 U.S.C.A. § 3121(b)(20).

For treatment of these services as self-employment, see § 562.

2 26 C.F.R. § 31.3121(b)(20)-1(a)(2).

3 26 C.F.R. § 31.3121(b)(20)-1(a)(3).

4 26 C.F.R. § 31.3121(b)(20)-1(a)(4).

5 26 C.F.R. § 31.3121(b)(20)-1(a)(5).

6 26 U.S.C.A. § 3121(b)(20).

7 Flamingo Fishing Corp. v. U.S., 32 Fed. Cl. 377 (1994).

8 Rev. Rul. 77-102, 1977-1 C.B. 299.

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## 70A Am. Jur. 2d Social Security and Medicare § 57

American Jurisprudence, Second Edition | May 2021 Update

### Social Security and Medicare

George Blum, J.D., John Bourdeau, J.D., Kerry M. Diggin, J.D., Romualdo P. Eclavea, J.D., Edward K. Esping, J.D., Tracy Bateman Farrell, J.D., Jill Gustafson, J.D., Janice Holben, J.D., Alan J. Jacobs, J.D., Anne Knickerbocker, J.D., Jack K. Levin, J.D., Anne E. Melley, J.D., LL.M., Tom Muskus, J.D., Karl Oakes, J.D., Eric C. Surette, J.D., and Barbara J. Van Arsdale, J.D.

### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 7. Other Services Excepted from Employment

## § 57. Services of student nurse

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed as a student nurse in the employ of a hospital or a nurses' training school are excepted from employment, if the student nurse is enrolled and regularly attending classes in a nurses' training school and such nurses' training school is chartered or approved pursuant to State law.<sup>1</sup>

The IRS has determined that Congress intended to exclude only part time or intermittent work for nominal earnings, where payment of the tax would be inconsequential and a nuisance, and where the benefit rights built up would be inconsequential. Thus, the services of a student nurse will be excepted from "employment" for FICA purposes only where the student nurse's service by the hospital or nurse's training school is substantially less than full time, the total amount of earnings is nominal, and the services are incidental parts of the training toward a qualifying degree as a nurse or in a specialized area of nursing. Full-time services of a student nurse may not be excepted from employment, where a full-time salary was received and the services performed were not incidental parts of a training program, even though the nurse was enrolled in and regularly attended classes in a specialized program at a state chartered nurses' training school.<sup>2</sup> Similarly, registered nurses, licensed practical nurses, and patient care assistants enrolled and attending classes in a nurse's training school, since they are not persons in training as an undergraduate member of a faculty as are student nurses, are employees, where they are not performing incidental services as part of their training and their remuneration is not nominal.<sup>3</sup>

Work of a student nurse is excluded from coverage even though the work of other employees of the hospital or nurses' training school is covered by social security.<sup>4</sup>



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Footnotes

- 1 [26 U.S.C.A. § 3121\(b\)\(13\); 42 U.S.C.A. § 410\(a\)\(13\); 26 C.F.R. § 31.3121\(b\)\(13\)-1\(a\).](#)
- 2 [Rev. Rul. 85-74, 1985-23 I.R.B. 18](#), deferred to and agreed with by [Johnson City Medical Center v. U.S.](#), 999 F.2d 973, 84 Ed. Law Rep. 924 (6th Cir. 1993).
- 3 [Priv. Ltr. Rul. 8449034, 1984 WL 270560 \(IRS PLR\)](#) (Aug. 31, 1984).
- 4 [Social Security Handbook § 922](#) (last revised Sept. 24, 2007).

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## 70A Am. Jur. 2d Social Security and Medicare § 58

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 7. Other Services Excepted from Employment

## § 58. Services specifically excepted from employment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed by an employee for an employer do not constitute employment if the services are specifically excepted from employment under [26 U.S.C.A. § 3121\(b\)\(1\)](#) through [26 U.S.C.A. § 3121\(b\)\(21\)](#).<sup>1</sup>

The services specifically excepted under [26 U.S.C.A. § 3121\(b\)\(1\), \(21\)](#) do not constitute employment even though they are performed within the United States, or are performed outside the United States on or in connection with an American vessel or American aircraft, or are performed outside the United States by a citizen of the United States for an American employer. Unless otherwise provided in the regulations to [26 U.S.C.A. § 3121\(b\)\(1\), \(21\)](#), those regulations apply to services performed after 1954.<sup>2</sup>

The exceptions from "employment" granted under the Social Security system do not result in an arbitrary discrimination that makes the FICA tax invalid. These exceptions have support in consideration of policy and practical convenience.<sup>3</sup>

An exception specifically listed in [26 U.S.C.A. § 3121\(b\)\(1\), \(21\)](#) attaches to the services performed by the employee and not to the employee as an individual. That is, the exception applies only to the services in an excepted class rendered by the employee.<sup>4</sup>

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Footnotes

- 1 26 C.F.R. § 31.3121(b)-4(a).
- 2 26 C.F.R. § 31.3121(b)-4(a).
- 3 *Helvering v. Davis*, 301 U.S. 619, 301 U.S. 672, 57 S. Ct. 904, 81 L. Ed. 1307, 109 A.L.R. 1319 (1937);  
*Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A.L.R. 1293 (1937).
- 4 26 C.F.R. § 31.3121(b)-4(b).

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## 70A Am. Jur. 2d Social Security and Medicare § 59

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 7. Other Services Excepted from Employment

## § 59. Included and excluded services

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

If one-half or more of the employee's time in the employ of a particular person in a pay period is spent in performing services which constitute employment, then all the services of that employee for that person in that pay period are deemed to be employment. If less than one-half of the employee's time in the employ of a particular person in a pay period is spent in performing services which constitute employment, then none of the services of that employee for that person in that pay period are deemed to be employment.<sup>1</sup> Thus, where a portion of the services performed by an employee for an employer during a pay period constitutes employment, and the remainder does not constitute employment, all the services performed by the employee for the employer during the period, for purposes of the taxes, are treated alike, that is, either all as included or all as excluded.<sup>2</sup>

### Definition:

A "pay period" is the period of not more than 31 consecutive calendar days for which a payment of remuneration is ordinarily made to the employee by the employer.<sup>3</sup>

If the pay periods for which payments of remuneration are made to the employee by the employer are of uniform duration, each such period constitutes a "pay period." If, however, the periods occasionally vary in duration, the "pay period" is the period for which a payment of remuneration is ordinarily made to the employee by the employer, even though that period does not coincide with the actual period for which a particular payment of remuneration is made. For example, if an employer ordinarily pays a particular employee for each calendar week at the end of the week, but the employee receives a payment in the middle of the week for the portion of the week already elapsed and receives the remainder at the end of the week, the "pay period" is still the calendar week; or if, instead, that employee is sent on a trip by such employer and receives at the end of the third week a single remuneration payment for three weeks' services, the "pay period" is still the calendar week.<sup>4</sup>

If there is only one period and such period does not exceed 31 consecutive calendar days for which a payment of remuneration is made to the employee by the employer, that period is deemed to be a "pay period."<sup>5</sup>

Where there are seasonal fluctuations there may be one customary seasonal pay period and another customary nonseasonal pay period.<sup>6</sup>

Services which constitute employment are not excluded and services which do not constitute employment are not included (1) for any services performed by the employee for the employer if the periods for which the employer makes payments of remuneration to the employee vary to the extent that there is no period "for which a payment or remuneration is ordinarily made to the employee," or (2) services performed by the employee for the employer if the period for which a payment of remuneration is ordinarily made to the employee by the employer exceeds 31 consecutive calendar days,<sup>7</sup> or (3) for any service performed by the employee for the employer during a pay period if any service is covered by Railroad retirement.<sup>8</sup> For any period where a person makes a payment of remuneration to an employee and only a portion of the employee's services constitutes employment, but the included or excluded rules are not applicable, the taxes attach with respect to those services that constitute employment.<sup>9</sup>

Services performed by a duly ordained or licensed minister of a church in the exercise of a ministry are generally exempted from "employment."<sup>10</sup>

**Practice Tip:**

Work performed in the United States was covered employment where the employer, a Canadian trucking corporation authorized to do business in the United States, employed Canadian citizens as truck drivers in its delivery and pickup as a motor carrier of shipments in the Niagara Falls, Ontario—Buffalo, New York area. Taxes on wages for employees' services performed within the United States must be paid regardless of what percentage of employees' total service in the United States and Canada was performed within the United States. The "included and excluded service" rule described above is not applicable in this situation. The statutory provision<sup>11</sup> does not apply where an individual performs service in the United States. (covered) and service in Canada (not covered).<sup>12</sup>

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Footnotes

- 1 26 U.S.C.A. § 3121(c); 42 U.S.C.A. § 410(b); 26 C.F.R. § 31.3121(c)-1(a), (c).
- 2 26 C.F.R. § 31.3121(c)-1(a), 20 C.F.R. § 404.1013(a).
- 3 26 U.S.C.A. § 3121(c); 42 U.S.C.A. § 410(b); 26 C.F.R. § 31.3121(c)-1(e).
- 4 26 C.F.R. § 31.3121(c)-1(e), 20 C.F.R. § 404.1013(b).
- 5 26 C.F.R. § 31.3121(c)-1(f).
- 6 Social Security Handbook § 968.2 (last revised June 30, 2004).
- 7 26 C.F.R. § 31.3121(c)-1(g), 20 C.F.R. § 404.1013(c).
- 8 26 U.S.C.A. § 3121(c), 26 C.F.R. § 31.3121(c)-1(g); 42 U.S.C.A. § 410(b).
- 9 26 C.F.R. § 31.3121(c)-1(h).
- 10 26 U.S.C.A. § 3121(b)(8).
- 11 26 U.S.C.A. § 3121(c).
- 12 *Inter-City Truck Lines, Limited v. U. S.*, 187 Ct. Cl. 290, 408 F.2d 686 (1969).

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## 70A Am. Jur. 2d Social Security and Medicare § 60

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


##### A. Covered Employment

##### 7. Other Services Excepted from Employment

## § 60. Services performed after 1936 and before 1955

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Services performed after 1936 and before 1955 which were employment under the applicable law in effect before 1955 constitute employment.<sup>1</sup>

Services performed after 1936 and before 1955 which were not employment under the applicable law in effect before 1955 do not constitute employment.<sup>2</sup>

Except for those services performed before 1955 and paid for after 1954,<sup>3</sup> a determination whether services performed before 1955 constitute employment is made in accordance with the regulations in effect before 1955 as well as the law then in effect.<sup>4</sup>

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### Footnotes

- <sup>1</sup> 26 C.F.R. § 31.3121(b)-2(a)(1)(i).
- <sup>2</sup> 26 C.F.R. § 31.3121(b)-2(a)(1)(ii).
- <sup>3</sup> § 25.
- <sup>4</sup> 26 C.F.R. § 31.3121(b)-2(a)(2).

For service performed after 1936 and before 1940, the applicable regulations are Regulation 91 (26 CFR Part 401) (1939).

For services performed after 1939 and before 1951, the applicable regulations are Regulation 106 (26 CFR Part 402) (1939).

For service performed after 1950 and before 1955, the applicable regulations are Regulation 128 (26 CFR Part 408) (1939).

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### Part One. Social Security and SSI Benefits


#### II. Coverage of Employers and Employees

##### B. Covered Employees

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

### Primary Authority

[3 U.S.C.A. §§ 105 to 107](#)

[5 U.S.C.A. §§ 3343, 3374, 3581, 3582, 5312 to 5317, 5351, 8332, 8334, 8342, 8331 et seq., 8401 to 8479](#)

[10 U.S.C.A. § 2360](#)

[22 U.S.C.A. §§ 3310, 4071i, 2501 to 2523, 4071 et seq.](#)

[25 U.S.C.A. § 450i](#)

[26 U.S.C.A. §§ 1 et seq., 176, 294, 401, 403, 414, 457, 501, 513, 1401, 1402, 3101 et seq., 3112, 3121, 3122, 3401, 6051, 6413, 7701](#)

[29 U.S.C.A. §§ 1691 et seq., 1706](#)

[42 U.S.C.A. §§ 401 to 405, 409 to 411, 414, 415, 418, 426-1, 433, 501, 1304, 1395c, 4951 to 4960, 5055](#)

[50 U.S.C.A. § 2157](#)

[Pub. L. No. 101-508, 104 Stat. 1388](#)

[Pub. L. No. 103-296, 108 Stat. 1521](#)

[Pub. L. No. 103-66, 107 Stat. 467](#)

[Pub. L. No. 105-61, 111 Stat. 1318](#)

[Pub. L. No. 98-118, 97 Stat. 803](#)

[Pub. L. No. 95-600](#)

[Pub. L. No. 98-21, 97 Stat. 67](#)

[Pub. L. No. 98-369, 98 Stat. 1126](#)

[Pub. L. No. 99-272, 100 Stat. 316](#)

20 C.F.R. §§ 404.1001, 404.1004, 404.1005, 404.1007, 404.1015, 404.1018, 404.1018a, 404.1018b, 404.1020 to 404.1022, 404.1025, 404.1026, 404.1058, 404.1068, 404.1075, 404.1200, 404.1202, 404.1204, 404.1205, 404.1206, 404.1207 to 404.1212, 404.1214 to 404.1220, 404.1230, 404.1231, 404.1232, 404.1234, 404.1255, 404.1902, 404.1903, 404.1905, 404.1910, 404.1913, 404.1914, 404.1915, 404.1930

26 C.F.R. §§ 31.3121(a)-1 to 31.3121(v)(2)-2, 36.3121(l)(7)-1, 36.3121(l)(8)-1, 36.3121(l)(9)-1

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Rev. Rul. 57-128, 1957-1 C.B. 311

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[Rev. Rul. 73-576, 1973-2 C.B. 336](#)

[Rev. Rul. 74-354, 1974-2 C.B. 326](#)

[Rev. Rul. 74-415, 1974-2 C.B. 337](#)

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[Rev. Rul. 79-232, 1979-2 C.B. 359](#)

[Rev. Rul. 79-49, 1979-1 C.B. 57](#)

[Rev. Rul. 80-149, 1980-1 C.B. 213](#)

[Rev. Rul. 84-56, 1984-1 C.B. 184](#)

[Rev. Rul. 92-106, 1992-2 C.B. 258](#)

[SSA POMS RM 04001.001](#)


[Soc. Sec. Rul. 69-7, 67-13, 69-60, 69-61, 72-33, 72-36, 73-31, 73-57, 74-5, 77-16, 80-3c, 82-21a, 82-42, 87-10c, 87-18c](#)

[Social Security Handbook §§ 927, 940.1, 940.2, 940.4, 1000.3, 1001, 1002.1, 1002.2, 1002.4, 1003.1, 1003.2, 1004.2, 1005.2, 1006.3, 1007.2 to 1007.4, 1008.3, 1008.4, 1009, 1010.1, 1010.2, 1013.1, 1013.2, 1014, 1015.1, 1016.1, 1016.2, 1020.1, 1020.2](#)

[53 Fed. Reg. 32972](#), August 29, 1988

#### **A.L.R. Library**

[A.L.R. Index, Social Security](#)

[West's A.L.R. Digest, Social Security and Public Welfare](#)  [125.1](#) to [134](#)

#### **Treatises and Practice Aids**

[Social Security Law and Practice §§ 2:80, 2:81, 3:38](#)

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## 70A Am. Jur. 2d Social Security and Medicare § 61

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees


##### 1. In General

##### a. Basic Considerations

## § 61. Generally; status as "employee" under usual common law rules

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

### A.L.R. Library

[Trusts: merger of legal and equitable estates where sole trustees are sole beneficiaries, 7 A.L.R.4th 621](#)

[Insurance agents or salesmen as within coverage of social security or unemployment compensation acts, 39 A.L.R.3d 872](#)

For the purposes of status as an employee, the term "employee" includes, among others, any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.<sup>1</sup> Thus, an individual is an employee if under the usual common law rules the relationship between him or her and the person for whom he or she performs services is the legal relationship of employer and employee.<sup>2</sup> Generally, an individual is a common-law employee if the person for whom work is performed may tell the individual what to do and how, when, and where to do it.<sup>3</sup> The person or firm for whom work is performed does not have to give these orders, but needs only the right to do so.<sup>4</sup> An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules.<sup>5</sup> Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and

auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.<sup>6</sup>

In doubtful cases, whether the relationship of employer and employee exists under the usual common law rules is determined on an examination of the particular facts of each case.<sup>7</sup>

Under the regulations, some aspects of a job arrangement that indicate that a worker is a common law employee include: (1) the person for whom the worker performs services may fire the worker; (2) the person for whom the worker performs services furnishes the workers with tools or equipment and a place to work; (3) the worker receives training from the person for whom the worker performs services or is required to follow that person's instructions; (4) the worker must do the work himself or herself; (5) the worker does not hire, supervise, or pay assistants (unless employed as a foreman, manager, or supervisor); (6) the person for whom the worker performs services sets the worker's hours of work, requires him or her to work full-time, or restricts him or her from doing work for others; (7) the person for whom the worker performs services pays the worker's business or traveling expenses; and (8) the worker is paid by the hour, week, or month.<sup>8</sup>

Particular factors that may be examined to determine whether a common law employment relationship exists for employment tax purposes include: (1) the right to control the manner or means; (2) the skill required; (3) the source of instrumentalities and tools; (4) location of the work; (5) the duration of the relationship; (6) the ability to assign additional projects to the worker; (7) the worker's discretion over working hours; (8) the method of payment; (9) the worker's role in hiring and paying assistants; (10) whether the work was part of the employer's regular business; (11) whether the employer is in business; (12) the provision of employee benefits; and (13) the tax treatment of the worker.<sup>9</sup>

All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees.<sup>10</sup>

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. If an employer-employee relationship actually exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.<sup>11</sup>

Although an individual may be an employee under the tests in the regulations, his or her services may be of such a nature, or performed under such circumstances, as not to constitute employment.<sup>12</sup>

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#### Footnotes

- 1 26 U.S.C.A. § 3121(d)(2); 42 U.S.C.A. § 410(j)(2); 20 C.F.R. § 404.1005(b)(2); SSA POMS RS 02101.010(C)(1)(b).
- 2 26 U.S.C.A. § 3121(d)(2); 42 U.S.C.A. § 410(j)(2); 20 C.F.R. § 404.1005(b)(2); SSA POMS RS 02101.010(C)(1)(b).
- 3 20 C.F.R. § 404.1007(a).
- 4 20 C.F.R. § 404.1007(a).
- 5 26 C.F.R. § 31.3121(d)-1(c)(2).
- 6 26 C.F.R. § 31.3121(d)-1(c)(2).
- 7 26 C.F.R. § 31.3121(d)-1(c)(3), 20 C.F.R. § 404.1007(d).
- 8 20 C.F.R. § 404.1007(b).
- 9 *Ren-Lyn Corp. v. U.S.*, 968 F. Supp. 363 (N.D. Ohio 1997).

For a more detailed discussion of the particular factors considered in evaluating employment relationship, see §§ 65 to 79.

10 26 C.F.R. § 31.3121(d)-1(a)(4).

11 26 C.F.R. § 31.3121(d)-1(a)(3).

12 26 C.F.R. § 31.3121(d)-1(a)(5).

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## 70A Am. Jur. 2d Social Security and Medicare § 62

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees


##### 1. In General

##### a. Basic Considerations

## § 62. Meaning of "usual common law rules"

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

The "usual common law rules" are used in determining whether an individual performing services is an employee. According to the Supreme Court, the term is to be used in a generic sense, to mean "the standards developed by the courts through years of adjudication," rather than in a technical sense to mean those standards developed by "common law" courts as opposed to courts of admiralty.<sup>1</sup>

No single factor is determinative since all of the relevant factors must be considered, and the determination is made on a realistic appraisal of the situation as a whole. Nevertheless, the "right to control" test is the most important factor, and it is the "right" to control, rather than the actual control exercised, that is persuasive.<sup>2</sup> Moreover, when the work in question is not generally recognized as a distinct occupation, trade, or business, it is ordinarily an integral part of some trade or business, indicating that the individual performing the work is likely to be an employee of that particular business.<sup>3</sup>

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### Footnotes

<sup>1</sup> U.S. v. W. M. Webb, Inc., 397 U.S. 179, 90 S. Ct. 850, 25 L. Ed. 2d 207 (1970).

<sup>2</sup> § 65.

3

§ 66.

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees


##### 1. In General

##### a. Basic Considerations

## § 63. Relative importance of individual factors in determining whether employer-employee relationship exists

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

The courts have expressly stated that the entire situation in which individuals perform services must be examined, and that no single factor is determinative, in making an assessment whether the relationship is an employer-employee relationship or an independent contractor relationship.<sup>1</sup>

Some courts state that a determination of the employment relationship calls for a "realistic" application of the common-law rules.<sup>2</sup>

### Observation:

Congress intended that the employment relationship be decided by a realistic application of the rules of common law, with specific reference to the common-law distinction between an employee and an independent contractor.<sup>3</sup> A court's function in determining the employer-employee relationship is to realistically apply the common-law test in deciding whether the workers with which the court is concerned are the employees of a taxpayer or whether their relationship to the taxpayer is that of independent contractor.<sup>4</sup>

The "realistically construed" aspect of the common-law concept of employer-employee extends the common-law concept beyond its usual scope in the field of torts.<sup>5</sup> The end-point determination—whether the person for whom the services are performed is an "employer" within the common-law meaning of that term—must be made on the basis of actual reality by looking to the substance of the arrangement and giving weight to all relevant factors.<sup>6</sup>

A business supplying specialized registered nurses to hospitals in need of temporary additional staffing showed that it had a reasonable basis for treating the nurses as independent contractors, where the nurses were free to choose their assignments from those available and they performed no services on the business' premises.<sup>7</sup>

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#### Footnotes

- 1 [In re Rasbury](#), 141 B.R. 752 (N.D. Ala. 1992); [Henry v. U.S.](#), 452 F. Supp. 253 (E.D. Tenn. 1978); [Automated Typesetting, Inc. v. U.S.](#), 527 F. Supp. 515 (E.D. Wis. 1981).
- 2 [M. F. A. Mut. Ins. Co. v. U.S.](#), 314 F. Supp. 590 (W.D. Mo. 1970); [International Exterminator Corp. v. U.S.](#), 305 F. Supp. 676 (N.D. Tex. 1969); [Bonney Motor Exp., Inc. v. U.S.](#), 206 F. Supp. 22 (E.D. Va. 1962); [Illinois Tri-Seal Products, Inc. v. U. S.](#), 173 Ct. Cl. 499, 353 F.2d 216 (1965).
- 3 [U.S. v. Thorson](#), 282 F.2d 157 (1st Cir. 1960).
- 4 [U.S. v. Thorson](#), 282 F.2d 157 (1st Cir. 1960).
- 5 [Titanium Ores Corp. v. U.S.](#), 205 F. Supp. 606 (D. Md. 1962).
- 6 [Illinois Tri-Seal Products, Inc. v. U. S.](#), 173 Ct. Cl. 499, 353 F.2d 216 (1965).
- 7 [Critical Care Register Nursing, Inc. v. U.S.](#), 776 F. Supp. 1025 (E.D. Pa. 1991), nonacquiescence recommended by, [AOD-1994-5](#), 1994 WL 805238 (I.R.S. AOD 1994) and nonacq., 1994-32 I.R.B.4.

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## 70A Am. Jur. 2d Social Security and Medicare § 64

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees


##### 1. In General

##### a. Basic Considerations

## § 64. Use of "economic reality" test

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1 to 134

Based on the statement in *Bartels* that "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service,"<sup>1</sup> the administrative agencies prepared new regulations which embodied the so-called "economic reality" test. However, before these regulations could be put into effect, Congress passed a joint resolution<sup>2</sup> referred to as the "Status Quo Resolution" or the "Gearhart Resolution," the purpose of which was to disapprove the proposed regulations and to reiterate Congress' intention that the employee status should be determined by the traditional legal tests. By such resolution, Congress unequivocally tied the coverage of these tax provisions to the body of decisional law defining the employer-employee relationship in various occupations.<sup>3</sup>

Congress intended that the employment relationship be decided by a realistic application of the rules of common law, with specific reference to the common-law distinction between an employee and an independent contractor.<sup>4</sup> The legislative history of the "Gearhart" resolution leaves no room to doubt that a court's function in determining the employer-employee relationship is to realistically apply the common-law test in deciding whether workers with which the court is concerned are employees of a taxpayer or whether their relationship to the taxpayer is that of independent contractor.<sup>5</sup> Since the passage of the resolution, the courts have indicated that it is inappropriate to use the "economic reality" test when determining the employment relationship, one court stating that the existence or absence of an employment relationship is to be ascertained not by use of the economic reality test but by applying the common-law rules realistically.<sup>6</sup>

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Footnotes

- 1 [Bartels v. Birmingham](#), 332 U.S. 126, 67 S. Ct. 1547, 91 L. Ed. 1947, 172 A.L.R. 317 (1947).
- 2 [62 Stat. 438](#) (1948).
- 3 [U.S. v. W. M. Webb, Inc.](#), 397 U.S. 179, 90 S. Ct. 850, 25 L. Ed. 2d 207 (1970).
- 4 [§ 63](#).
- 5 [U.S. v. Thorson](#), 282 F.2d 157 (1st Cir. 1960).
- 6 [Illinois Tri-Seal Products, Inc. v. U. S.](#), 173 Ct. Cl. 499, 353 F.2d 216 (1965).

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees


##### 1. In General

##### b. Factors in Evaluating Employment Relationship

## § 65. Right to control individual's work

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 128.1

An employer-employee relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.<sup>1</sup> That is, an employee is subject to the will and control of the employer not only as to what should be done but how it should be done.<sup>2</sup>

Where the individual performs work for another according to his or her own manner and method, free from the direction or right of direction in matters relating to the performance of the work, he or she is not an employee.<sup>3</sup> If the individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he or she is not an employee.<sup>4</sup>

A requirement to do the work personally is an element of control because it indicates that the person for whom the services are performed is interested in the methods as well as the results.<sup>5</sup> He or she is interested not only in getting a desired result but also in who does the job.<sup>6</sup> A lack of control is indicated when the person engaged to perform the services has the right to hire a substitute without the permission or knowledge of the person for whom the services are performed.<sup>7</sup>

A requirement that the individual performing the services do so in the order or sequence set by the firm for whom the services are performed is a factor indicating control because it shows that the individual is not free to follow his or her own pattern of work, but must follow the established routines and schedules of the employer.<sup>8</sup> A requirement that regular oral or written reports be submitted to the employer is also an element of control.<sup>9</sup>

An individual performing services for a number of persons or firms at the same time is ordinarily not an employee.<sup>10</sup> While the connection with a number of firms keeps the individual free from the control of any one firm,<sup>11</sup> it is possible, however, that an individual may work for a number of people or firms and still be an employee of one or all of them, as where a bookkeeper may perform services for four firms, two hours every working day for each firm, on each firm's premises and be so controlled and directed as to be an employee of all of them.<sup>12</sup>

Where a company has arranged to supply consultants to foreign steel manufacturers, the consultants are deemed not employees of the company, where the company does not have the right to instruct or direct the consultants in any way regarding the manner or means of their performance.<sup>13</sup>

It is the right to control, not actual control, that determines whether an employment relationship exists,<sup>14</sup> thus, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is enough if he or she has the right to do so.<sup>15</sup>

The nature of the individual's work may be such that little supervision is necessary; the absence of a need to control, therefore, must not be confused with the absence of a right to control.<sup>16</sup> Where the nature of a person's work requires little supervision, there is no need for actual supervision,<sup>17</sup> since all that is required is that the right of control exists and must be available for exercise.<sup>18</sup> The instructions may be in the form of manuals or written procedures which show how the desired result is to be accomplished.<sup>19</sup>

Training is a factor of control because it indicates that the person for whom the services are performed wants the services performed in a particular method or manner, and this is especially true if the training is given periodically or at frequent intervals. The training may be by an experienced employee, by correspondence, by required attendance at meetings, or by other methods.<sup>20</sup>

If the firm for whom services are performed hires, supervises, and pays others on the same job as the individual performing the services, the firm usually exercises control over all the people on the job, and thus, all these people are employees.<sup>21</sup>

**Observation:**

Although no single factor is determinative that an employment relationship exists and the total situation must be examined,<sup>22</sup> the right to control test has been deemed to be of paramount importance.<sup>23</sup>

Footnotes

- 1 26 C.F.R. § 31.3121(d)-1(c)(2), 20 C.F.R. § 404.1007; SSA POMS RS 02101.020.
- 2 Lifetime Siding, Inc. v. U.S., 359 F.2d 657 (2d Cir. 1966).
- 3 Ralls, Inc. v. U. S., 200 Ct. Cl. 240, 470 F.2d 579 (1972).
- 4 26 C.F.R. § 31.3121(d)-1(c)(2).
- 5 SSA POMS RS 02101.036(A).
- 6 SSA POMS RS 02101.036(A).
- 7 SSA POMS RS 02101.036(C).
- 8 SSA POMS RS 02101.048(A).
- 9 SSA POMS RS 02101.050(A).
- 10 SSA POMS RS 02101.062.
- 11 SSA POMS RS 02101.062.
- 12 SSA POMS RS 02101.062.
- 13 American Consulting Corp. v. U.S., 454 F.2d 473 (3d Cir. 1971).
- 14 Idaho Ambucare Center, Inc. v. U.S., 57 F.3d 752 (9th Cir. 1995).
- 15 26 C.F.R. § 31.3121(d)-1(c)(2), 20 C.F.R. § 404.1007(a).
- 16 McGuire v. U.S., 349 F.2d 644 (9th Cir. 1965).
- 17 Air Terminal Cab, Inc. v. U.S., 478 F.2d 575 (8th Cir. 1973).
- 18 McCormick v. U. S., 209 Ct. Cl. 331, 531 F.2d 554, 37 A.L.R. Fed. 84 (1976).
- 19 SSA POMS RS 02101.030.
- 20 SSA POMS RS 02101.032.
- 21 SSA POMS RS 02101.038.
- 22 § 63.
- 23 U.S. v. W. M. Webb, Inc., 397 U.S. 179, 90 S. Ct. 850, 25 L. Ed. 2d 207 (1970); Ralls, Inc. v. U. S., 200 Ct. Cl. 240, 470 F.2d 579 (1972).

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees


##### 1. In General

##### b. Factors in Evaluating Employment Relationship

## § 66. Status in distinct trade or business

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 128.1

Direction and control are usually present if a person's services are integrated into the business operation of the firm for whom the services are performed.<sup>1</sup> When the success or continuation of a business depends to an appreciable degree upon the performance of certain kinds of services, the persons who perform those services must necessarily be subject to a certain amount of control by the business owner.<sup>2</sup>

If the work performed by an individual is not a distinct occupation, trade, or business, it is ordinarily an integral part of some trade or business, and in such case, the individual performing the work is considered an employee of that particular trade or business.<sup>3</sup> Thus, entertainers are employees where their individuality is subordinated to the purpose of producing an integrated entertainment for the public, as distinguished from a loose collection of vaudeville acts.<sup>4</sup>

Where the work in question is recognized as a distinct occupation, trade, or business, the individual performing the work may be considered an independent contractor rather than an employee performing services as an integral part of an employer's business.<sup>5</sup>

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Footnotes

- 1 [SSA POMS RS 02101.034\(A\)](#).
- 2 [SSA POMS RS 02101.034\(A\)](#).
- 3 [Bishop v. U.S.](#), 476 F.2d 977 (5th Cir. 1973); [Neill v. U.S.](#), 271 F. Supp. 445 (S.D. Miss. 1967).
- 4 [Club Hubba Hubba v. U.S.](#), 239 F. Supp. 324 (D. Haw. 1965).
- 5 [American Consulting Corp. v. U.S.](#), 454 F.2d 473 (3d Cir. 1971); [Lanigan Storage & Van Co. v. U.S.](#), 389 F.2d 337 (6th Cir. 1968).

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees


##### 1. In General

##### b. Factors in Evaluating Employment Relationship

## § 67. Skill and training required

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 128.1

The skill required to perform the work in question is a factor considered by the courts in determining whether an employer-employee relationship exists for Federal Insurance Contributions Act purposes.<sup>1</sup> Where the work requires little or no skill, this tends to show that the persons performing the services are employees; however, where the work requires a specific skill not taught through in-house training, the courts have held that the individuals involved are independent contractors and not employees.<sup>2</sup>

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### Footnotes

- <sup>1</sup> [Avis Rent A Car System, Inc. v. U.S.](#), 503 F.2d 423 (2d Cir. 1974); [McGuire v. U.S.](#), 349 F.2d 644 (9th Cir. 1965); [Neill v. U.S.](#), 271 F. Supp. 445 (S.D. Miss. 1967).
- <sup>2</sup> [Saiki v. U.S.](#), 306 F.2d 642 (8th Cir. 1962); [Lowen Corp. v. U.S.](#), 72 A.F.T.R.2d 93-6350, 1993 WL 245960 (D. Kan. 1993), decision [aff'd](#), 49 F.3d 651 (10th Cir. 1995).

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## 70A Am. Jur. 2d Social Security and Medicare § 68

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees


##### 1. In General

##### b. Factors in Evaluating Employment Relationship

## § 68. Source of worker's tools or place of work

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 128.1

The source of either a worker's tools or equipment or place of work, or both, is a factor in determining the employee status of individuals.<sup>1</sup> An employer ordinarily furnishes the tools and place of work to his or her employees while the independent contractor furnishes his or her own.<sup>2</sup> Thus, a corporation that provides materials, ladders, and staging and supplies the place of work to the degree possible considering the nature of the work, is deemed the employer of the individuals doing the work, even though the workers supplied their own hand tools, since many skilled laborers supply their own hand tools.<sup>3</sup>

Where equipment is necessary to perform a task, particularly when it is of significant value requiring a substantial investment, the worker furnishing such equipment in the performance of services is an independent contractor.<sup>4</sup>

A significant investment by a worker in the facilities used to perform services for another is a factor that tends to establish an independent contractor status.<sup>5</sup> Facilities include equipment or premises (that is, land and buildings) necessary for work, such as office furniture, tools, and machinery, but do not include tools, instrument, clothing, etc., that are provided by employees as a common practice in their particular trade, nor does it include education, experience, or training.<sup>6</sup> An employer-employee relationship exists when a worker has little or no investment (that is, investment in real assets, plant, equipment, and intangible assets) in the business and is economically dependent on the employer for facilities. A significant investment may be a factor to establish that an employer-employee relationship does not exist if it is real, essential, and adequate.<sup>7</sup>

**Observation:**

Ownership of equipment or premises by the worker points toward an independent contractor status since the owner has the right to control their use. However, if the owner, as part of the agreement, surrenders complete control over the equipment or premises and the right to decide how to use them, the fact of ownership is less significant.<sup>8</sup>

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**Footnotes**

- 1 26 C.F.R. § 31.3121(d)-1(c)(2), 20 C.F.R. § 404.1007(b)(2).
- 2 [Air Terminal Cab, Inc. v. U.S.](#), 478 F.2d 575 (8th Cir. 1973); [Mladinich v. U.S.](#), 379 F. Supp. 117 (S.D. Miss. 1974); [McCormick v. U. S.](#), 209 Ct. Cl. 331, 531 F.2d 554, 37 A.L.R. Fed. 84 (1976).
- 3 [Security Roofing & Const. Co. v. U.S.](#), 163 F. Supp. 794 (D. Mass. 1958).
- 4 [McCormick v. U. S.](#), 209 Ct. Cl. 331, 531 F.2d 554, 37 A.L.R. Fed. 84 (1976).
- 5 SSA POMS RS 02101.058(A).
- 6 SSA POMS RS 02101.058(B).
- 7 SSA POMS RS 02101.058(C), (D).
- 8 SSA POMS RS 02101.058(E).

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

##### B. Covered Employees


##### 1. In General

##### b. Factors in Evaluating Employment Relationship

## § 69. Length of employment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 128.1

The employer-employee relationship is ordinarily characterized by some permanency or length of time in employment, or by some regularity in the performance of the services, while the independent contractor is usually transient in the performance of his or her services. The permanency of the relationship, the length of time of employment, and the regularity with which the services are performed are considered by the courts in determining whether the individual performing the services is an employee.<sup>1</sup>

A worker who has a continuing relationship with the person for whom he or she works is more likely to be an employee than is one who engages in a single job or for sporadic or infrequent jobs.<sup>2</sup> A continuing work relationship may be assumed if the work is performed frequently and recurring at irregular intervals, on call of the employer, or whenever the work is available.<sup>3</sup>

The status of individuals performing services has been held to be that of employees where: (1) in the great majority of instances, they took each job as offered by the company found to be their employer; (2) most of the individuals devoted most of their efforts to the company's work over a substantial period of time; and (3) in the case of any request for further work from the company's customers or from inquiries by passers-by, the company had to be notified or the request or the inquiry had to be referred to the company.<sup>4</sup>

Individuals are employees where the company for whom they perform services restrict them from the performance of outside work, and the same persons have performed services for the company over a long period of years.<sup>5</sup> However, where a trucking firm during one year used the services of approximately 4,000 different individuals and each individual unloaded trucks of about 400 different trucking firms during that same year, the court held that such individuals involved were not employees, the court stating that it is difficult to believe that any reasonable application of the law relating to the handling of social security was ever intended to cover 1,600,000 different employer-employee relationships in one year.<sup>6</sup>

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#### Footnotes

- 1 [Lifetime Siding, Inc. v. U.S., 359 F.2d 657 \(2d Cir. 1966\); American Consulting Corp. v. U.S., 454 F.2d 473 \(3d Cir. 1971\); Anderson v. U.S., 450 F.2d 567 \(5th Cir. 1971\); Illinois Tri-Seal Products, Inc. v. U. S., 173 Ct. Cl. 499, 353 F.2d 216 \(1965\).](#)
- 2 [SSA POMS RS 02101.040\(A\).](#)
- 3 [SSA POMS RS 02101.040\(A\).](#)
- 4 [Security Roofing & Const. Co. v. U.S., 163 F. Supp. 794 \(D. Mass. 1958\).](#)
- 5 [Ben v. US, 139 F. Supp. 883 \(N.D. N.Y. 1956\), judgment aff'd, 241 F.2d 127 \(2d Cir. 1957\).](#)
- 6 [Bonney Motor Exp., Inc. v. U.S., 206 F. Supp. 22 \(E.D. Va. 1962\).](#)

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## 70A Am. Jur. 2d Social Security and Medicare § 70

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees

##### 1. In General

##### b. Factors in Evaluating Employment Relationship

## § 70. Method of payment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 126, 128.1

The manner of payment—by the job or by the hour—is considered a significant indication of the nature of the employment relationship.<sup>1</sup> Payment by the hour, week, or month generally points to an employer-employee relationship, if this method of payment is not a way of paying a lump sum agreed upon as the cost of doing a job.<sup>2</sup> The payment of regular amounts at stated intervals to a worker is a strong indication that an employer-employee relationship exists.<sup>3</sup> However, if payment is made by the job or on a straight commission basis, this generally indicates that the individual performing the services is an independent contractor. Payment by the job includes a lump sum which is computed by the number of hours required to do the job at a fixed rate per hour, and such a payment is distinguished from payment by the hour.<sup>4</sup>

A worker is generally an employee if the employer pays the worker's business or travel expenses. Controlling the expenses indicates the right to regulate and direct the worker's business activities.<sup>5</sup>

Where, although the individuals were paid by the job, they could and normally did request to be paid and were paid an advance each Friday, representing the proportionate share of the work already done, and as a practical matter, the individuals worked regular and full hours even though they could set their own hours, the court held that the individuals were employees.<sup>6</sup> On the other hand, individuals performing services paid on the basis of a fixed rate for each unit known as a "square" (100 square feet) of roofing or siding applied have been held not employees, where the individuals were not required to take any job offered but

usually returned to the firm's office for another job when one was completed; the individuals did not agree to work regularly for the firm and the firm did not agree to keep the individuals supplied with work for any given period of time; although the individuals had no specified working hours, to make good money they ordinarily put in a full day's work, traveling to and from their work at their own expense; and, to collect the final pay for a job, the individuals had to obtain the owner's signature to a certificate that the work had been satisfactorily completed in accordance with the contract.<sup>7</sup>

Individuals who signed three-year contracts with a firm requiring them to perform a specified task for hatcheries with payment varying from ½ cent to 1 cent per unit were not employees, where payment was made by the hatcheries to the individuals and at the end of the season the individuals paid the firm an agreed commission; the individuals were not paid on a commission basis; on the contrary, it was the individuals who paid the firm a percentage of their earnings in exchange for the firm's having arranged the engagement with the hatcheries.<sup>8</sup>

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#### Footnotes

- 1 [American Consulting Corp. v. U.S.](#), 454 F.2d 473 (3d Cir. 1971); [Anderson v. U.S.](#), 450 F.2d 567 (5th Cir. 1971); [Air Terminal Cab, Inc. v. U.S.](#), 478 F.2d 575 (8th Cir. 1973); [Mladinich v. U.S.](#), 379 F. Supp. 117 (S.D. Miss. 1974).
- 2 [SSA POMS RS 02101.052\(A\)](#).
- 3 [SSA POMS RS 02101.052\(A\)](#).
- 4 [SSA POMS RS 02101.052\(B\)](#).
- 5 [SSA POMS RS 02101.054\(A\)](#).
- 6 [Security Roofing & Const. Co. v. U.S.](#), 163 F. Supp. 794 (D. Mass. 1958).
- 7 [U.S. v. Thorson](#), 282 F.2d 157 (1st Cir. 1960).
- 8 [Saiki v. U.S.](#), 306 F.2d 642 (8th Cir. 1962).

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## 70A Am. Jur. 2d Social Security and Medicare § 71

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees


##### 1. In General

##### b. Factors in Evaluating Employment Relationship

## § 71. Opportunity for profit or loss

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 128.1

An individual who is in a position to realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while an individual who is an employee is not in such a position.<sup>1</sup> "Profit or loss" implies the use of capital by an individual engaged in an independent business.<sup>2</sup> The opportunity for higher earnings, such as pay on a piecework basis or the possibility of a gain or loss from a commission arrangement, is not considered as profit or loss.<sup>3</sup>

Whether a profit is realized or loss suffered is generally dependent upon management decisions, that is, the one responsible for a profit or loss is free to use skill, initiative, and judgment in conducting a business of his or her own.<sup>4</sup> The opportunity for profit or loss may be established by one or more of a variety of circumstances, such as where an individual: (1) agrees to perform specific jobs for prices agreed upon in advance and pay expenses incurred in connection with the work; (2) has continuing and recurring liabilities or obligations, and succeeding or failing depends on the relation of receipts to expenses; (3) has his or her own office, equipment, materials or other facilities to do the work; (4) hires, directs and pays assistants; and (5) performs services, or pay assistants to perform services, which establish or affect his or her own business reputation but not the reputation of those who purchase the services.<sup>5</sup>

An employee is ordinarily paid a fixed amount for a fixed period, involving no requirement to invest in the enterprise, and leaving no risk of loss and no opportunity for profit, other than the fixed wage; however, where an individual invests in the

enterprise and his or her activity involves a risk of losing his or her investment or an opportunity for profiting therefrom, this is an indication that the individual performing the services is an independent contractor. The opportunity for profit or loss has been considered by the courts in determining whether the individuals involved were employees.<sup>6</sup>

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Footnotes

- 1 [SSA POMS RS 02101.060.](#)
- 2 [SSA POMS RS 02101.060.](#)
- 3 [SSA POMS RS 02101.060.](#)
- 4 [SSA POMS RS 02101.060.](#)
- 5 [SSA POMS RS 02101.060.](#)
- 6 [Avis Rent A Car System, Inc. v. U.S., 503 F.2d 423 \(2d Cir. 1974\); Bishop v. U.S., 476 F.2d 977 \(5th Cir. 1973\); Anderson v. U.S., 450 F.2d 567 \(5th Cir. 1971\); Air Terminal Cab, Inc. v. U.S., 478 F.2d 575 \(8th Cir. 1973\); McCormick v. U. S., 209 Ct. Cl. 331, 531 F.2d 554, 37 A.L.R. Fed. 84 \(1976\).](#)

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## 70A Am. Jur. 2d Social Security and Medicare § 72

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees


##### 1. In General

##### b. Factors in Evaluating Employment Relationship

## § 72. Employee-type benefits

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 128.1

The presence or absence of those benefits normally associated with an employer-employee relationship—paid vacation, sick leave, insurance, pension benefits, and the like—is an indication of the individual's status, and while the presence of such benefits is consistent with an employee status, the courts do not consider their absence as necessarily indicative of an independent contractor status. While the presence or absence of employee-type benefits has not been especially influential in the final determination of the question, in several cases the presence or absence of employee-type benefits has been considered in determining the individual's status.<sup>1</sup>

The presence of employee benefits was a significant factor in the court's decision that the individuals performing the services were employees, where the individuals involved had no capital investment in the business; they received their compensation by deducting their expenses from their gross receipts and then splitting the difference with the person supplying the equipment used; and the fact that after the individuals had completed one year of work they were entitled to a one-week paid vacation, sick leave benefits, and specified paid holidays, was consistent with an employer-employee relationship.<sup>2</sup>

### CUMULATIVE SUPPLEMENT

**Statutes:**

29 C.F.R. Pt. 13 (29 C.F.R. §§ 13.1 to 13.58), as added effective November 29, 2016, contains the Department of Labor's rules establishing paid sick leave for federal contractors, including federal government requirements (29 C.F.R. §§ 13.11 to 13.12), contractor requirements (29 C.F.R. §§ 13.21 to 13.27), enforcement (29 C.F.R. §§ 13.41 to 13.44), and administrative proceedings (29 C.F.R. §§ 13.51 to 13.58).

**[END OF SUPPLEMENT]**

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**Footnotes**

- 1 [Avis Rent A Car System, Inc. v. U.S.](#), 503 F.2d 423 (2d Cir. 1974); [American Consulting Corp. v. U.S.](#), 454 F.2d 473 (3d Cir. 1971); [Air Terminal Cab, Inc. v. U.S.](#), 478 F.2d 575 (8th Cir. 1973).
- 2 [Air Terminal Cab, Inc. v. U.S.](#), 478 F.2d 575 (8th Cir. 1973).

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees


##### 1. In General

##### b. Factors in Evaluating Employment Relationship

## § 73. Parties' view of their relationships

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 128.1

The intent or belief of the person performing the services, or the person or firm for whom the services are performed or who is otherwise connected with the transaction, or both, is a factor contributing to a determination of whether the person performing the services is an employee, and such factor has exerted varying degrees of influence on the outcome in those cases where the factor was considered.<sup>1</sup>

In close cases, the determination of the status of particular individuals performing services is usually made with reliance on the parties' view of the arrangement; accordingly, the status of the individuals involved has been held to be that of employees rather than independent contractors, where in addition to the federal employment tax returns, the company regularly filed state employment tax returns based on the same standard of liability, the court concluding that the parties looked upon themselves as employers and employees during the periods in question.<sup>2</sup>

Individuals performing services for a firm which provided workmen's compensation insurance and offered Blue Cross-Blue Shield group coverage were held not to be employees, where the Blue Cross-Blue Shield representative who testified was unable to say whether its requirement that only employees were eligible for coverage meant employees in the common-law sense or under some other definition, the court stating that little significance can be attached to such provisions, as they only indicate that the firm believes that the individuals might be employees for those specific purposes.<sup>3</sup>

A provision in a contract between a firm and certain individuals stating that the individuals are to refer to themselves as employees except in legal and tax matters is not controlling as to the status of the individuals; while the belief and intentions of the parties as to their status is a relevant consideration, such considerations are not determinative, particularly when the record discloses contradictory testimony on the point.<sup>4</sup>

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Footnotes

- 1 American Consulting Corp. v. U.S., 454 F.2d 473 (3d Cir. 1971); Lanigan Storage & Van Co. v. U.S., 389 F.2d 337 (6th Cir. 1968); Neill v. U.S., 271 F. Supp. 445 (S.D. Miss. 1967); Kurio v. U.S., 281 F. Supp. 252 (S.D. Tex. 1968).
- 2 Jackson v. Phinney, 266 F. Supp. 835 (W.D. Tex. 1967).
- 3 Thor Co. v. U.S., 173 F. Supp. 65 (D. Mass. 1959).
- 4 American Consulting Corp. v. U.S., 454 F.2d 473 (3d Cir. 1971).

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees


##### 1. In General

##### b. Factors in Evaluating Employment Relationship

## § 74. Right to discharge individual

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 128.1

The right to discharge is an important factor indicating that the person possessing that right is an employer,<sup>1</sup> thus it has been considered a factor in determining whether the individuals in question are employees.<sup>2</sup>

### Observation:

Sometimes an employer's right to discharge is restricted because of a contract with a labor union. Such a restriction does not detract from the existence of an employer-employee relationship.<sup>3</sup>

An employee has the right to end the relationship with the employer any time he or she wishes without incurring liability.<sup>4</sup> An independent contractor, on the other hand, usually agrees to complete a specific job and is responsible to complete the job at a satisfactory level or he or she will be liable for breach of contract.<sup>5</sup>

Noting that at least one aspect of the right to control is the right to discharge, a court determined that the right to discharge in a case where the discharge can not take place immediately is substantially the same as the more conventional one, the important element being that the right to discharge exists even if it can not be executed at all moments.<sup>6</sup>

A contractor who has employed a subcontractor has the right to terminate the work when the subcontractor's performance falls below standard. The fact that individuals performing certain services can be discharged if their work results are not satisfactory does not require a finding that the individuals are employees of the corporation.<sup>7</sup>

Individuals are independent contractors where among other things, the cancellation or termination of the three-year contracts between the firm involved and the individuals would be based only upon the individuals' failure to maintain at least a certain accuracy in their work or a generally unsatisfactory performance; this factor does not equal a right to discharge the individuals on the part of the firm, so as to bring the individuals within the definition of employees.<sup>8</sup>

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#### Footnotes

- 1 26 C.F.R. § 31.3121(d)-1(c)(2).
- 2 *Avis Rent A Car System, Inc. v. U.S.*, 503 F.2d 423 (2d Cir. 1974); *Security Storage & Van Co. of Norfolk, Virginia v. U. S.*, 528 F.2d 1166 (4th Cir. 1975); *Bishop v. U.S.*, 476 F.2d 977 (5th Cir. 1973); *Air Terminal Cab, Inc. v. U.S.*, 478 F.2d 575 (8th Cir. 1973).
- 3 SSA POMS RS 02101.066(A).
- 4 SSA POMS RS 02101.068(A).
- 5 SSA POMS RS 02101.068(B).
- 6 *Jackson v. Phinney*, 266 F. Supp. 835 (W.D. Tex. 1967).
- 7 *American Homes of New England, Inc. v. U.S.*, 173 F. Supp. 857 (D. Mass. 1959).
- 8 *Saiki v. U.S.*, 306 F.2d 642 (8th Cir. 1962).

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees


##### 1. In General

##### b. Factors in Evaluating Employment Relationship

## § 75. Right to change job or site

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 128.1

The presence or absence of the right to change an individual's job or jobsite is a factor contributing to the determination of the individual's status.<sup>1</sup> Accordingly, where a corporation hires individuals who are trained by the corporation president and their fellow workers, who are paid by the hour and punch a time clock and who use the company's truck and machinery but provide their own hand tools, and who can be discharged at any time and can be moved from one job to another, the relationship between the corporation and the individuals is that of employer-employee.<sup>2</sup>

Similarly, where the owner of concessions selects individuals to operate the concessions but reserves the right to move the operator of one concession to another, the individuals involved are deemed the employees of the owner.<sup>3</sup>

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### Footnotes

- <sup>1</sup> [Security Roofing & Const. Co. v. U.S.](#), 163 F. Supp. 794 (D. Mass. 1958).
- <sup>2</sup> [Bonded Insulation & Const. Co. v. U. S.](#), 131 F. Supp. 635 (D.N.J. 1955).
- <sup>3</sup> [Martin v. U.S.](#), 267 F. Supp. 268 (M.D. Fla. 1967).

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees


##### 1. In General

##### b. Factors in Evaluating Employment Relationship

## § 76. Existence of contract underlying relationship

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 128.1

The existence of a contract underlying the parties' relationship is not considered decisive in the determination of an individual's independent contractor status, although it is taken into account along with other relevant factors.<sup>1</sup>

Individuals who performed under contracts denominating them as independent contractors have been found to be employees, where the contracts were for an entire season of seven months, each contract granted the firm involved an option to renew the contract for the next succeeding season upon the same terms, and provided that if the firm did renew, the individuals could not participate in any other similar activity in the United States during the off-season without the firm's written consent.<sup>2</sup>

An individual performing services, who obtained his prospects through his own contacts and independent sources, has been held not an employee, where the individual's written agreement with the firm authorized the individual to canvass for business and assigned him no exclusive territory, and contained a statement entitled "Independent Contractor" which provided that nothing in the contract could be construed to create the relationship of employer and employee.<sup>3</sup>

Where written contracts of employment are signed by individuals hired by a firm, but each is either abandoned or waived by the parties and the contracts do not purport to control the details of the individuals' performance, the individuals are independent

contractors rather than employees; such contracts have no bearing on the test to be applied in determining whether the individuals are independent contractors or employees.<sup>4</sup>

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Footnotes

- 1 [American Consulting Corp. v. U.S.](#), 454 F.2d 473 (3d Cir. 1971); [Anderson v. U.S.](#), 450 F.2d 567 (5th Cir. 1971).
- 2 [Ringling Bros.-Barnum & Bailey Combined Shows v. Higgins](#), 189 F.2d 865 (2d Cir. 1951).
- 3 [Zipser v. Ewing](#), 197 F.2d 728 (2d Cir. 1952).
- 4 [Farm & Home Modernization Corp v. US](#), 138 F. Supp. 423 (N.D. N.Y. 1956).

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees


##### 1. In General

##### b. Factors in Evaluating Employment Relationship

### § 77. Compliance with statutory requirements may avoid employment taxes; "safe harbor provision"

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 128.1

Taxpayers who have a reasonable basis for treating workers other than as employees and who satisfy other statutory requirements can avoid employment tax liability with respect to such workers until Congress enacts legislation classifying the workers as independent contractors or employees.<sup>1</sup>

A taxpayer's treatment of an individual as a nonemployee will be upheld for employment tax purposes provided: (1) the taxpayer does not treat the individual as an employee for any period; (2) for periods after December 31, 1978 all required federal tax returns are filed by the taxpayer on a basis consistent with the taxpayer's treatment of such an individual as a nonemployee; and (3) the taxpayer has a reasonable basis for not treating such an individual as an employee.<sup>2</sup>

A taxpayer claiming that he or she is entitled to treat his or her workers as independent contractors pursuant to this safe harbor provision still bears the burden of establishing, by a preponderance of the evidence, that he or she meets the requirements of the provision.<sup>3</sup>

A corporation engaged in the livery business and in providing taxicab services, that believed in good faith that its drivers were independent contractors based on oral contracts formed whenever a driver leased a cab on a daily or weekly basis, has been held entitled to avail itself of the safe harbor provisions of the statute, despite the contention of the IRS that the corporation's

failure to file informational returns (Form 1099) precluded the availability of the provision, because the corporation was not legally required to file informational returns, as its fare-splitting arrangement with its drivers did not constitute payments within the meaning of the applicable statute.<sup>4</sup> However, where a corporate taxpayer misclassified some of its workers as independent contractors, it was held not entitled to utilize the safe harbor provision because the taxpayer failed to file Form 1099's, identifying the workers as independent contractors, until after the IRS assessed the taxes in dispute at the conclusion of the administrative process.<sup>5</sup>

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#### Footnotes

- 1 [26 U.S.C.A. § 3401 note \(Pub. L. No. 95-600, § 530\).](#)
- 2 [26 U.S.C.A. § 3401 note \(Pub. L. No. 95-600, § 530\(a\)\(1\)\).](#)
- 3 [Springfield v. U.S., 88 F.3d 750, 149 A.L.R. Fed. 803 \(9th Cir. 1996\).](#)
- 4 [J & J Cab Service, Inc. v. U.S., 75 A.F.T.R.2d 95-618, 1995 WL 214326 \(W.D. N.C. 1995\).](#)
- 5 [Bruecher Foundation Services, Inc. v. U.S., 383 Fed. Appx. 381 \(5th Cir. 2010\).](#)

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## 70A Am. Jur. 2d Social Security and Medicare § 78

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees


##### 1. In General

##### b. Factors in Evaluating Employment Relationship

§ 78. Compliance with statutory requirements may avoid employment taxes; "safe harbor provision"—Reasonable basis for not treating an individual as an employee

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 128.1

A taxpayer has a "reasonable basis" for not treating an individual as an employee, under the safe harbor provision,<sup>1</sup> if the taxpayer's treatment of such individual for such period was in reasonable reliance on any of the following: (1) judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer; (2) a past IRS audit of the taxpayer in which there was no assessment attributable to the treatment (for employment tax purposes) of the individuals holding positions substantially similar to the position held by this individual; or (3) long-standing recognized practice of a significant segment of the industry in which such individual was engaged.<sup>2</sup>

A taxpayer who fails to meet any of the three provisions above may nevertheless be entitled to relief if he or she can demonstrate in some other manner a reasonable basis for not treating the individual as an employee.<sup>3</sup> Thus, a good-faith reliance on the advice of a trusted accountant or attorney by the taxpayer with regard to the tax treatment of workers has been recognized as a reasonable basis,<sup>4</sup> although there is authority holding to the contrary as to an accountant's advice.<sup>5</sup>

A taxpayer must prove its assertion, by a preponderance of the evidence, that it had a reasonable basis for improperly classifying employees as independent contractors under the safe harbor provisions of the statute.<sup>6</sup>

The Internal Revenue Service has stated that the industry practice safe harbor test requires that a practice be uniformly conducted by enough employers to be recognized as the practice of a significant segment of the industry, that is, nearly all of the employers in the segment should be found to be participating.<sup>7</sup> However, it has been held that the phrase "a significant segment of the industry" in the statute cannot be interpreted to mean a majority or more than one half of the members of the industry, because a significant segment does not mean a majority, and Congress intended that the statute be construed liberally in favor of taxpayers.<sup>8</sup> For competitive reasons, small geographic areas generally provide the most appropriate basis for evaluating whether a particular practice is the practice of a significant segment of the industry; thus for instance, a geographical difference in the treatment of workers in a particular industry can be seen in the different rulings on dancers in adult entertainment establishments. Such performers have been held to be employees in New York,<sup>9</sup> while similar performers in Washington have been found to be tenants or lessees, rather than employees, of the establishments where they worked.<sup>10</sup>

The safe harbor provisions of the statute were created by Congress to avoid the undeserved punishment of employers who had misclassified their employees as independent contractors in good faith.<sup>11</sup> The language and legislative history of these provisions manifest an intent to rectify unfairness and surprise, rather than provide a loophole for taxpayers bent on avoiding known tax consequences.<sup>12</sup>

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#### Footnotes

- 1 26 U.S.C.A. § 3401 note (Pub. L. No. 95-600, § 530), discussed in § 77.
- 2 26 U.S.C.A. § 3401 note (Pub. L. No. 95-600, § 530(a)(2)).
- 3 Rev. Proc. 85-18, 1985-1 C.B. 518.
- 4 Smoky Mountain Secrets, Inc. v. U.S., 910 F. Supp. 1316 (E.D. Tenn. 1995).
- 5 In re Arndt, 201 B.R. 853 (M.D. Fla. 1996).
- 6 Boles Trucking, Inc. v. U.S., 77 F.3d 236 (8th Cir. 1996).
- 7 TAM 8749001.
- 8 In re Bentley, Unempl. Ins. Rep. (CCH) ¶ 17793A.19, 94-1 U.S. Tax Cas. (CCH) ¶ 50140, 73 A.F.T.R.2d 94-1367, 1994 WL 171200 (Bankr. E.D. Tenn. 1994), judgment aff'd, 175 B.R. 652 (E.D. Tenn. 1994).
- 9 303 West 42nd Street Enterprises, Inc. v. I.R.S., 916 F. Supp. 349 (S.D. N.Y. 1996), rev'd on other grounds, 181 F.3d 272 (2d Cir. 1999).
- 10 JJR, Inc. v. U.S., 950 F. Supp. 1037 (W.D. Wash. 1997), aff'd, 156 F.3d 1237 (9th Cir. 1998).
- 11 In re Arndt, 201 B.R. 853 (M.D. Fla. 1996).
- 12 303 West 42nd Street Enterprises, Inc. v. I.R.S., 916 F. Supp. 349 (S.D. N.Y. 1996), rev'd on other grounds, 181 F.3d 272 (2d Cir. 1999).

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## 70A Am. Jur. 2d Social Security and Medicare § 79

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees


##### 1. In General

##### b. Factors in Evaluating Employment Relationship

### § 79. Compliance with statutory requirements may avoid employment taxes; "safe harbor provision"—Taxpayer's treatment of individual as employee

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare 125.1, 128.1

An employer "treats" an individual as an employee where it: (1) withholds income or FICA taxes from an individual's wages, regardless of whether it pays the taxes over to the IRS; or (2) files an employment tax return (including Forms 940, 941, 942, 943, and W-2) for a period with respect to an individual, regardless of whether it withheld tax from the individual.<sup>1</sup> However, an employer does not "treat" an individual as an employee where it files a delinquent or amended employment tax return for a particular tax period with respect to an individual as a result of IRS compliance procedures, including collection or examination activities, but not IRS Service Center notices that merely advise the taxpayer that no return has been filed and requests information from the taxpayer, or where the IRS prepares a return, or an audit Form 2504 is signed.<sup>2</sup>

A trucking company that leased its trucks and drivers to carriers can not call its drivers independent contractors because the company had treated its only driver as an employee in 1978 and 1979, even though from 1982 through 1990 it had treated all of the individuals who drove its trucks, including the driver employed in 1978 and 1979, as independent contractors, where the type of work performed by the sole driver in 1978 and 1979 was substantially similar to the work performed by all of the drivers in the 1980's.<sup>3</sup> Similarly, taxpayers who employed sign salespersons to sell real estate signs to residential real estate brokers are the employers of all of their salespersons, where the salespersons who had been treated as employees held positions that were substantially similar to those held by the salespersons treated as independent contractors.<sup>4</sup>

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Footnotes

- 1 [Rev. Proc. 85-18, 1985-13 I.R.B. 27 § 3.03\(A\), \(B\).](#)
- 2 [Rev. Proc. 85-18, 1985-13 I.R.B. 27 § 3.03\(C\) to \(E\).](#)
- 3 [Halfhill v. U.S. I.R.S., 927 F. Supp. 171 \(W.D. Pa. 1996\).](#)
- 4 [Lowen Corp. v. U.S., 785 F. Supp. 913 \(D. Kan. 1992\).](#)

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## 70A Am. Jur. 2d Social Security and Medicare § 80

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


#### B. Covered Employees

#### 2. Family Employment

## § 80. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 126.5, 128.1

#### A.L.R. Library

[Social Security Acts: Requisite of employment as affected by family relationship between alleged employer and employee, 8 A.L.R.3d 696](#)

Certain work or services are excepted from covered employment because of the existence of a family relationship between the employee and the individual employing him or her.<sup>1</sup> Thus, certain services performed by an individual for his or her spouse, children under 18 for a parent, and parents employed to do domestic services in the houses of their children may be excluded from covered employment. In other situations, a bona fide employment agreement between a family member employer and a family member employee constitutes employment.<sup>2</sup>

#### Observation:

For purposes of determining whether a family relationship exists in the context of determining covered employment for social security purposes, adoptive, foster, and step relationships are included, as well as natural ones.<sup>3</sup>

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#### Footnotes

- 1                                26 C.F.R. § 31.3121(b)(3)-1(a).
- 2                                26 U.S.C.A. § 3121(b)(3); 42 U.S.C.A. § 410(a)(3).
- 3                                Social Security Handbook § 927.

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


#### B. Covered Employees

#### 2. Family Employment

## § 81. Service in employ of spouse

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 126.5, 128.1

Employment for social security purposes does not include those services performed by an individual in the employ of his or her spouse, but only if the service is not in the course of the employer's trade or business, or if the employment is domestic service in a private home of the spouse.<sup>1</sup> Accordingly, a wife's performance of services as part-time legal assistant for her husband, an attorney who was the sole proprietor of his firm, constitutes employment in the service of the spouse, not self-employment, and is therefore excluded from social security coverage.<sup>2</sup>

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### Footnotes

<sup>1</sup> 26 U.S.C.A. § 3121(b)(3)(A); 42 U.S.C.A. § 410(a)(3)(A).

<sup>2</sup> *Clift v. Sullivan*, 927 F.2d 367 (8th Cir. 1991).

As to employment of a spouse of a shareholder of a corporation, see § 88.

As to employment of a spouse by a partnership in which the other spouse is a partner, see § 89.

As to a spouse performing services as a self-employed person, see § 536.

## 70A Am. Jur. 2d Social Security and Medicare § 82

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


#### B. Covered Employees

#### 2. Family Employment

### § 82. Services by child for his or her parent

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 126.5, 128.1

Services performed by a child under the age of 18 in the employ of his or her father or mother are excluded from covered employment,<sup>1</sup> and this exclusion applies only during the time the son or daughter is under the statutorily prescribed age.<sup>2</sup>

Also excepted from covered employment are nonbusiness work<sup>3</sup> or domestic service<sup>4</sup> performed as an employee of an individual's parent while under 21.<sup>5</sup>

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#### Footnotes

<sup>1</sup> 26 U.S.C.A. § 3121(b)(3)(A); 42 U.S.C.A. § 410(a)(3)(A).

<sup>2</sup> 26 C.F.R. § 31.3121(b)(3)-1(b).

As to the employment of a child by a family corporation, see § 88.

For employment of a child by a partnership in which a parent is a partner, see § 89.

<sup>3</sup> 20 C.F.R. § 404.1058(a)(3) ("nonbusiness work" means services that do not promote or advance the trade or business of the employer, and does not include services performed for a corporation).

<sup>4</sup> 20 C.F.R. § 404.1057(b) ("domestic service" is work of a household nature performed in or about a private home of the employer).

5                                      20 C.F.R. § 404.1015(a)(2).

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees

#### 2. Family Employment

### § 83. Services performed by parent for son or daughter in the course of son's or daughter's trade or business

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare 🔑125.1, 126.5, 128.1

Since 1960, services performed by an individual in the employ of his or her son or daughter are covered employment, except for most domestic services and service not in the course of the employer's trade or business.<sup>1</sup> Thus, although the law does not prohibit a child from employing a parent in a trade or business, even for the express purpose of obtaining social security coverage, nevertheless to achieve this result, a bona fide employment relationship must exist between the parties.<sup>2</sup> In such cases, the employed parent must document that services were rendered in a genuine employment relationship and that wages, not gratuitous money allowances, were received.<sup>3</sup>

If the parent is not competent to do the job, there is no bona fide employment relationship; thus, where a claimant and her son alleged that she was employed by him as his assistant in his real estate business, to answer the telephone, receive rent money, make appointments, and attend to other minor details of the business, but the claimant was 67 years old, had virtually no prior work experience, could neither read nor write English, and had been sick during at least part of the alleged employment, the claimed employment has been held only illusory, and the mother's services were excluded from employment.<sup>4</sup> Similarly, where a stepfather's two stepsons reduced the stepfather's share of the gross rentals from a building which the three owned but paid him wages as their employee, the agreement has been deemed a collusive family arrangement to permit the stepfather to obtain social security benefits from his own rental income rather than from a genuine payment of wages.<sup>5</sup>



**Observation:**

The term trade or business includes only those activities that are normally recognized as compensable employment; thus, a parent who babysits for her grandchildren is not employed in her child's trade or business.<sup>6</sup>

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Footnotes

- 1 [SSA POMS RS 02101.125\(A\)](#).
- 2 [Sabbagha v. Celebrezze](#), 345 F.2d 509 (4th Cir. 1965).  
As to the employment of parent by a family corporation, see [§ 88](#).  
For employment of a parent by a partnership in which a child is a partner, see [§ 89](#).
- 3 [SSA POMS RS 02101.125\(A\)](#).
- 4 [Sabbagha v. Celebrezze](#), 345 F.2d 509 (4th Cir. 1965).
- 5 [Eastman v. Gardner](#), 373 F.2d 481 (6th Cir. 1967).
- 6 [Loveless v. Weinberger](#), 492 F.2d 1291 (6th Cir. 1974); [Wycklendt v. Weinberger](#), 381 F. Supp. 479 (E.D. Wis. 1974).

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## 70A Am. Jur. 2d Social Security and Medicare § 84

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


#### B. Covered Employees

#### 2. Family Employment

### § 84. Domestic services performed by parent in son's or daughter's private home

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 126.5, 128.1

Services performed by an individual in the employ of his or her son or daughter are excluded from employment if the services are domestic service in a private home of the employer.<sup>1</sup> However, such domestic service is not excluded if: (1) the employer is a surviving spouse or a divorced individual and has not remarried, or has a spouse living in the home who has a mental or physical condition which results in the spouse being incapable of caring for a son, daughter, stepson, or stepdaughter for at least four continuous weeks in the calendar quarter in which the service is rendered; (2) the son, daughter, stepson, or stepdaughter of such employer is living in the home; and (3) the son, daughter, stepson, or stepdaughter has not attained age 18 or has a mental or physical condition which requires the personal care and supervision of an adult for at least four continuous weeks in the calendar quarter in which the service is rendered.<sup>2</sup>

#### Observation:

As to condition (3) above, the mere fact that a mental or physical disability, whether temporary or permanent, renders a child or spouse incapable of self-support does not necessarily mean that the child requires the personal care and supervision of an adult or that the spouse is incapable of caring for a child.<sup>3</sup> A written statement by a doctor of the existence of the mental or physical condition of the child or spouse which states that the child requires the personal care and supervision of an adult, or that the spouse

is incapable of caring for a child, and which sets forth the period of time during which the condition has existed and is likely to exist, will usually be sufficient evidence to establish the existence and duration of the condition at the time of the statement.<sup>4</sup>

With respect to domestic service in a private home of a son or daughter, it does not matter whether the services are performed on a farm operated for profit.<sup>5</sup>

Where a father took care of his son's two minor children by taking them to school, feeding them, and taking care of them in the evening; he was paid \$100 a month by his son; and during this time, the son's wife was living at home, but was suffering from chronic alcoholism and from a mental condition, the combination of which incapacitated her the majority of the time, an employment relationship existed between the father and his son, and the services constituted covered employment.<sup>6</sup>

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#### Footnotes

- 1 26 U.S.C.A. § 3121(b)(3)(B); 42 U.S.C.A. § 410(a)(3)(B).
- 2 26 U.S.C.A. § 3121(b)(3)(B); 42 U.S.C.A. § 410(a)(3)(B); 20 C.F.R. § 404.1015(a)(4).
- 3 26 C.F.R. § 31.3121(b)(3)-1(b).
- 4 26 C.F.R. § 31.3121(b)(3)-1(b).
- 5 26 C.F.R. § 31.3121(b)(3)-1(b).
- 6 Soc. Sec. Rul. 73-31.

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


#### B. Covered Employees

#### 2. Family Employment

### § 85. Services performed by parent for son-or daughter-in-law

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 126.5, 128.1

The statute does not exclude from covered employment services performed for a son-in-law or daughter-in-law, thus, whether such services constitute covered employment depends on the facts in each case. Accordingly, the failure of a son-in-law to give close instructions and carefully supervise his mother-in-law who was performing household chores and babysitting has been deemed detrimental to the mother-in-law's claim of covered employment.<sup>1</sup>

Also, where a parent performs the same services without pay before, during, or after the period of alleged employment, there is no bona fide employment relationship. Accordingly, where a son-in-law purchased land with the intention of establishing a resort camp and his father-in-law helped with clearing and filling the land, construction, painting, shingling, building fences and similar tasks; a few years later the son-in-law's insurance business increased and the father-in-law's work on the land increased, after which the son-in-law agreed to pay his father-in-law \$5 a week, but the payments ceased when the father-in-law applied for old age benefits, although the father-in-law's duties remained the same, the court held that the payments were not wages, but a cash allowance for spending money.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Irvin v. Hobby, 131 F. Supp. 851 \(N.D. Iowa 1955\).](#)

2 [Domanski v. Celebrezze, 323 F.2d 882, 8 A.L.R.3d 687 \(6th Cir. 1963\).](#)

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


#### B. Covered Employees

#### 2. Family Employment

## § 86. Employment in brother's or sister's trade or business

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 126.5, 128.1

Employment in a brother's or sister's trade or business can qualify a claimant for coverage, provided the brother or sister exercises control and direction to insure that the employee does the services for which he or she was retained.<sup>1</sup>

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### Footnotes

- <sup>1</sup> [Social Security Law and Practice § 2:80](#).  
For employment of a brother or sister by a family corporation, see [§ 88](#).  
For employment of a brother or sister by a partnership in which a brother or sister is a partner, see [§ 89](#).

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## 70A Am. Jur. 2d Social Security and Medicare § 87

American Jurisprudence, Second Edition | May 2021 Update

### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


#### B. Covered Employees

#### 2. Family Employment

## § 87. Domestic services for brother or sister

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 126.5, 128.1

Whether domestic services performed for a brother or sister present an employer-employee relationship depends on the facts of each case. Accordingly, domestic services performed by a brother or sister have been found or held to constitute covered employment where—

- a sister was employed to perform domestic services on a full-time basis for her two brothers who owned and operated a farm, and she was subject to the direction and control of the brothers and could be discharged by them for failure to perform her duties.<sup>1</sup>
- a brother engaged his sister to perform nursing care for their invalid mother, the work was performed on a round-the-clock basis, the sister was first hired on a trial basis, the brother constantly checked up on the records she was required to keep, and checked with his mother, her doctor and his other sister to insure that the care his sister was providing was of high quality, and he would have discharged her if he became dissatisfied with her services.<sup>2</sup>
- a sister cared for her brother's child in her own house and the brother visited every weekend and directed the sister in regard to the child's wardrobe, recreation, schooling, and extracurricular activities.<sup>3</sup>
- a sister worked for her three bachelor brothers as their housekeeper, the brothers agreed to pay her \$1,800 in addition to her room and board, and the brothers did not know how to cook or do other routine housekeeping chores so their failure to give

her directions as to specific details for a job she had been doing satisfactorily for a number of years was not fatal, but they did give directions as to specific farm chores that they wanted her to do.<sup>4</sup> On the other hand, domestic services performed by a brother or sister have been found or held not to constitute covered employment where—

- a woman provided services for her brother who was physically incapacitated with a severe foot injury, and for her physically and mentally ill sister-in-law, the court stating that there was no written arrangement and almost no supervision or instructions, and wages were paid with considerable irregularity.<sup>5</sup>
- a claimant stated that she would have done the housekeeping for her sister even if she were not paid because her sister was providing her with a good home.<sup>6</sup>
- a sister's duties were substantially the same for the years before her brother agreed to pay her \$100 a month as they were after the agreement was reached and where payment started after the Social Security Act provided coverage for domestic servants.<sup>7</sup>
- one sister lost rental income of \$16 or \$17 a month because the property was condemned and the sister who had supported her began to pay her \$17 a month for the same household chores she had been performing.<sup>8</sup>
- one sibling's keeping house while the other is a wage earner has been found to be a relationship of mutual affection of people arranging for a shared household and each makes a contribution for mutual comfort.<sup>9</sup>
- the employment period coincided with the statutory period needed by the claimant for coverage, when an informal affectionate relationship existed between the claimant and her brother, she had previously been her brother's dependent, and her brother did not need her domestic services before or after the period of alleged employment.<sup>10</sup>
- payments were made by one sister to another because of an arrangement for sharing family expenses.<sup>11</sup>

**Observation:**

In babysitting situations, the specificity of the instructions may be crucial. Detailed instructions should be given even though the babysitter may have successfully raised or may be raising a number of her own children.<sup>12</sup>

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**Footnotes**

- 1 Rev. Rul. 54-521, 1954-2 C.B. 355.
- 2 O'Brien v. Flemming, 178 F. Supp. 387 (S.D. Ill. 1959).
- 3 Holland v. Celebrezze, 223 F. Supp. 347 (E.D. Tenn. 1963).
- 4 Nichols v. Cohen, 290 F. Supp. 207 (S.D. Ill. 1968).
- 5 Cardwell v. Celebrezze, 241 F. Supp. 328 (E.D. Tenn. 1965).
- 6 Thurston v. Hobby, 133 F. Supp. 205 (W.D. Mo. 1955).
- 7 Murray v. Folsom, 147 F. Supp. 298 (D. D.C. 1957).



- 8                    Norment v. Hobby, 124 F. Supp. 489 (N.D. Ala. 1953).  
9                    Palmer v. Celebrezze, 334 F.2d 306 (3d Cir. 1964); Bullock v. Celebrezze, 360 F.2d 615 (4th Cir. 1966);  
                     Foss v. Gardner, 363 F.2d 25 (8th Cir. 1966); Sizer v. Weinberger, 401 F. Supp. 109 (W.D. Va. 1975).  
10                  Stevenson v. Flemming, 200 F. Supp. 705 (S.D. N.Y. 1960), order aff'd, 297 F.2d 811 (2d Cir. 1961).  
11                  Barron v. Ribicoff, 295 F.2d 432 (4th Cir. 1961).  
12                  Social Security Law and Practice § 2:81.

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## 70A Am. Jur. 2d Social Security and Medicare § 88

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### Social Security and Medicare

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


#### B. Covered Employees

#### 2. Family Employment

## § 88. Family corporations

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 126.5, 128.1

Work or services performed by a family member for a family corporation are not excepted from covered employment for social security purposes.<sup>1</sup>

A claimant has been held an employee of the corporation, where there was "proper adherence to normal corporate routines" when the claimant transferred her farm and a duplex house to a newly-organized corporation.<sup>2</sup>

The fact that a corporate secretary is the wife of the corporation's president does not prevent her from being a corporate employee.<sup>3</sup> However, an individual can not prove that he was employed by a corporation set up by his wife where his income tax returns showed that he received the full and direct benefit of the corporate income even though he was not the owner of the mines operated by the corporation, he received no wages from the company even though he did all the day-to-day work of running the mines, and the mines' accountant testified that the individual was self-employed, and did pay self-employment taxes after the first two years that he was involved.<sup>4</sup>

### Observation:

Although the family employment exclusion does not apply to work performed for a corporation, if the corporation is used as a device to obtain employment coverage for a parent, a court will disregard it and deny coverage.<sup>5</sup>

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#### Footnotes

- 1 20 C.F.R. § 404.1015(b).
- 2 *Stark v. Flemming*, 283 F.2d 410 (9th Cir. 1960).
- 3 *De Martinez v. Gardner*, 291 F. Supp. 132 (D.P.R. 1968).
- 4 *Craft v. Califano*, 431 F. Supp. 430 (W.D. Va. 1977).
- 5 *Howatt v. Folsom*, 253 F.2d 680 (3d Cir. 1958).

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees


#### B. Covered Employees

#### 2. Family Employment

## § 89. Family partnerships

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 126.5, 128.1

Work or services performed by a family member for a partnership are not excepted from covered employment for social security purposes unless the required family relationship exists between the family member and each of the partners.<sup>1</sup> Accordingly, where a mother sold an apartment building for \$20 to her son and daughter who formed a limited partnership which then employed the mother to manage the building, collect rents and pay the obligations in return for the net profits which she had previously been receiving, the arrangement has been deemed legal, but it is not an employer-employee relationship.<sup>2</sup> Likewise, a father employed by a partnership composed of his two sons in a plumbing business has been held not engaged in a covered employment.<sup>3</sup>

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### Footnotes

- <sup>1</sup> 20 C.F.R. § 404.1015(b).
- <sup>2</sup> *George v. Richardson*, 463 F.2d 1139 (5th Cir. 1972).
- <sup>3</sup> *Frantes v. Celebrezze*, 237 F. Supp. 609 (D. Minn. 1964).

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

#### B. Covered Employees

#### 3. Foreign Employment


##### a. Employees of Foreign Affiliates of U.S. Employers

##### (1) In General

## § 90. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 128.1

An American employer may enter into an agreement on the prescribed form with the Internal Revenue Service to extend social security coverage to services performed outside the United States by a U.S. citizen or the resident employees of a foreign affiliate of the American employer.<sup>1</sup> An American employer entering into such an agreement is liable for taxes in an amount equal to the sum of the employer and employee Federal Insurance Contributions Act (FICA) taxes that would have been imposed if the foreign affiliate had been subject to FICA taxes during the period covered by the agreement; no FICA tax is imposed on the employee.<sup>2</sup> The amounts paid to a United States citizen or resident for services outside the United States, and not in a United States possession, as an employee of a United States person, and amounts paid to a nonresident alien who performs work in the United States as an employee of a United States person or a foreign person are wages for FICA purposes.<sup>3</sup>

Social security coverage extended to individuals employed by a foreign subsidiary of a United States corporation, pursuant to an agreement for the purpose of extending coverage to citizens of the United States employed outside the United States by one or more of its subsidiaries, is limited to citizens of the United States. Accordingly, such coverage ceases on the date that such an employee ceases to be a United States citizen, and becomes a citizen of another country.<sup>4</sup> Since the United States has no legal power to levy employment taxes on foreign affiliates of American companies, it is not a violation of equal protection for the

social security system to cover work performed by an American citizen working in a foreign country for an American company, while excluding work performed by an American citizen in a foreign country for a foreign affiliate of an American company.<sup>5</sup>

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Footnotes

1 [26 U.S.C.A. § 3121\(l\); 26 C.F.R. § 36.3121\(l\)\(1\)-1\(a\)\(1\).](#)

2 [26 U.S.C.A. § 3121\(l\); 26 C.F.R. § 36.3121\(l\)\(1\)-1\(a\)\(1\).](#)

3 [Rev. Rul. 92-106, 1992-2 C.B. 258.](#)

4 [Rev. Rul. 57-576, 1957-2 C.B. 641.](#)

5 [Monleone v. Sullivan, 735 F. Supp. 5 \(D.D.C. 1990\).](#)

Substantial evidence supported the Social Security Administration's (SSA) determination that a retiree during specified working years had been employed by a foreign affiliate of an American company lacking coverage agreement with the SSA, not by the American company, and thus was owed no retirement benefits for those years; payroll was located abroad, a letter from the manager of the employer identified the employer as a division of a foreign subsidiary of an American corporation, and the letter from the American company by which the retiree claimed to have been employed stated that he was employed by its "foreign affiliate." [McGauran v. Social Security Admin., 34 Fed. Appx. 584 \(9th Cir. 2002\).](#)

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

##### B. Covered Employees

##### 3. Foreign Employment


##### a. Employees of Foreign Affiliates of U.S. Employers

##### (1) In General

## § 91. Services to which foreign affiliate employee coverage agreement applies

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 128.1

A foreign affiliate employee coverage agreement cannot be made applicable to any services performed outside the United States which would not constitute employment, for Federal Insurance Contributions Act (FICA) tax purposes,<sup>1</sup> if those services were performed in the United States.<sup>2</sup> A foreign affiliate employee coverage agreement also cannot be made applicable to any services performed outside the United States which constitute employment for FICA tax purposes.<sup>3</sup> Accordingly, a foreign affiliate coverage agreement cannot apply to services for any employer performed by any employee on or in connection with an American vessel or aircraft, when outside the United States, if performed under a contract of service entered into in the United States or, during the performance of those services and while the employee is employed on it, the U.S. vessel or aircraft touches at a U.S. port. This is because such services do not constitute employment for FICA tax purposes.<sup>4</sup>

A foreign affiliate employee coverage agreement cannot be made applicable to remuneration which would constitute wages for FICA tax purposes,<sup>5</sup> even if the services for which the remuneration is paid constituted employment.<sup>6</sup>

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Footnotes

- 1                    §§ 23 to 26.
- 2                    26 C.F.R. § 36.3121(l)(1)-1(a)(2).
- 3                    26 C.F.R. § 36.3121(l)(1)-1(a)(2).
- 4                    26 C.F.R. § 36.3121(l)(1)-1(a)(2).
- 5                    § 357.
- 6                    26 C.F.R. § 36.3121(l)(1)-1(a)(2).

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

##### B. Covered Employees

##### 3. Foreign Employment


##### a. Employees of Foreign Affiliates of U.S. Employers

##### (1) In General

## § 92. American employers eligible to enter into foreign affiliate employee coverage agreements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 128.1

An American employer may enter into an agreement with the IRS for U.S. social security coverage of services performed by U.S. citizen or resident employees of a foreign affiliate if the U.S. employer has at least a 10% interest in the employing foreign affiliate, either directly or indirectly, through one or more entities.<sup>1</sup> The 10% interest in the foreign affiliate, in the case of a corporation, must be in the corporation's voting stock, and in the case of other entities, in the entity's profits.<sup>2</sup> For this purpose, "American employer" means an employer which is: (1) the United States or any of its instrumentalities; (2) an individual who is a U.S. resident; (3) a partnership, if two-thirds or more of the partners are U.S. residents; (4) a trust, if all of the trustees are U.S. residents; or (5) a corporation organized under the laws of the U.S. or of any state.<sup>3</sup>

Where a United States corporation wholly-owns a U.S. subsidiary, and such domestic subsidiary wholly owns a foreign subsidiary which owns 55% of the voting stock of a second foreign subsidiary, the U.S. subsidiary, rather than the U.S. parent corporation, is eligible to enter into an agreement with the District Director of Internal Revenue, to extend social security coverage to the U.S. citizens employed outside the U.S. by the second foreign subsidiary.<sup>4</sup>

Footnotes

1 [26 U.S.C.A. § 3121\(l\)\(6\).](#)

2 [26 U.S.C.A. § 3121\(l\)\(6\)\(B\).](#)

For the purposes of this rule, "stock" has the same meaning as in [26 U.S.C.A. § 7701\(a\)\(7\)](#), which defines "stock" as including shares in an association, joint-stock company, or insurance company. [26 C.F.R. § 36.3121\(l\)\(8\)-1\(d\).](#)

3 [26 U.S.C.A. § 3121\(h\), \(l\).](#)

4 [Rev. Rul. 60-380, 1960-2 C.B. 277.](#)

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

##### B. Covered Employees

##### 3. Foreign Employment


##### a. Employees of Foreign Affiliates of U.S. Employers

##### (2) Coverage Agreement

## § 93. Generally; filing of application form for agreement

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 128.1

An American employer may enter into an agreement with the Internal Revenue Service (IRS) for the extension of U.S. social security coverage to U.S. citizen and resident employees of a foreign affiliate by filing Form 2032, Contract Coverage Under Title II of the Social Security Act,<sup>1</sup> in accordance with the instructions on the form and the regulations.<sup>2</sup> A Form 2032 is also used by an American employer who wishes to amend its agreement with the IRS to extend U.S. social security coverage to U.S. citizen and resident employees of a foreign affiliate, so as to be made applicable, in the same manner and under the same conditions, to any one or more of its foreign affiliates not previously named in the agreement.<sup>3</sup>

When a foreign affiliate employee coverage agreement has been entered into by an American employer, the amounts equivalent to employee Federal Insurance Contributions Act taxes paid with respect to a covered employee are includible in the employee's gross income and are wages subject to withholding for U.S. federal income tax purposes.<sup>4</sup>

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### Footnotes

- 1 I.R.S. Announcement 83-168, 1983-43 I.R.B. 50.
- 2 26 C.F.R. § 36.3121(l)(1)-1(c); I.R.S. Announcement 83-168, 1983-43 I.R.B. 50.
- 3 I.R.S. Announcement 83-168, 1983-43 I.R.B. 50.
- 4 Rev. Rul. 79-49, 1979-1 C.B. 57.

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### Part One. Social Security and SSI Benefits

#### II. Coverage of Employers and Employees

##### B. Covered Employees

##### 3. Foreign Employment


##### a. Employees of Foreign Affiliates of U.S. Employers

##### (2) Coverage Agreement

## § 94. American employer's liability for amounts equivalent to FICA taxes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare  125.1, 128.1

An American employer which has entered into a foreign affiliate employee coverage agreement, or which has amended such an agreement, is liable for amounts equivalent to the employer and employee Federal Insurance Contributions Act (FICA) taxes on certain remuneration paid by each foreign affiliate named in the agreement or amended agreement, as if the remuneration constituted wages for FICA tax purposes.<sup>1</sup> The liability is incurred on the remuneration paid to all these employees of the American employer's foreign affiliates covered by the agreement who are U.S. citizens or residents and who perform services outside the U.S. (other than services constituting employment for U.S. social security purposes) for the foreign affiliates, but the liability is incurred only with respect to that portion of that remuneration paid by the foreign affiliate attributable to services performed during the period for which the agreement is in effect with respect to the foreign affiliate, and then only to the extent that the remuneration would constitute wages for FICA tax purposes if those services were performed in the U.S.<sup>2</sup>

If an employee performs services for more than one of the foreign affiliates named in the agreement or amended agreement, his or her services are regarded as being performed for a single employer for purposes of determining the amount of remuneration for those services which would constitute wages for FICA tax purposes if they were performed in the U.S.<sup>3</sup>

The amount of the American employer's liability under a coverage agreement for any period is determined in the same manner as liability for employer and employee FICA taxes is determined, under regulations relating to FICA taxes as in effect for the same period, with respect to wages paid by an employer to an employee.<sup>4</sup>

An American employer which has entered into a coverage agreement is also liable under the agreement for amounts equivalent to the amount of interest, additions to taxes, additional amounts and penalties which would apply if the remuneration constituted wages for FICA purposes.<sup>5</sup> However, an American employer's obligation to make payments under a coverage agreement on behalf of a foreign affiliate ends once the U.S. and the foreign country where the covered services are performed enter into a totalization agreement,<sup>6</sup> under which agreement the wages of the U.S. citizens working for the foreign subsidiary in the foreign country become subject to taxes for social security purposes under the social security system of the foreign country.<sup>7</sup>

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Footnotes

- |   |   |
|---|---|
| 1 | 26 C.F.R. § 36.3121(l)(1)-3(a)(1).                |
| 2 | 26 C.F.R. § 36.3121(l)(1)-3(a)(1).                |
| 3 | 26 C.F.R. § 36.3121(l)(1)-3(a)(1).                |
| 4 | 26 C.F.R. § 36.3121(l)(1)-3(a)(3).                |
| 5 | 26 C.F.R. § 36.3121(l)(1)-3(b).                   |
| 6 | As to totalization agreements, see §§ 111 to 120. |
| 7 | Rev. Rul. 79-232, 1979-2 C.B. 359.                |

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